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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURE OF THE STATE OF NORTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

In the event of the insolvency and subsequent court-supervised rehabilitation of an insurance company under the insurance statutes of its state of domicile, are the courts of the various states required by the full faith and credit clause of the United States Constitution to follow the prior decisions of the rehabilitation court even if those decisions affect the rights of citizens of other states against the insurer.

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the North Carolina state court.

The petitioner, Underwriters National Assurance Company, an Indiana insurance company, currently has no parent companies, subsidiaries or affiliates. However, prior to the petitioner's rehabilitation in 1977 when the petitioner's stock was placed in a voting trust, all of the petitioner's stock was owned by UNAC International Corporation, an Indiana general business corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner ("UNAC") respectfully petitions the Court to issue a writ of certiorari to the Supreme Court of North Carolina to review the judgment entered by that court on December 4, 1980, affirming an earlier decision by the North Carolina Court of Appeals adverse to UNAC and in favor of the respondents, the North Carolina Life and Accident and Health Insurance Guaranty Association ("North Carolina Guaranty Association") and the Insurance Commissioner and Treasurer of North Carolina.

REPORTS OF OPINIONS BELOW

The December 4, 1980, judgment of the Supreme Court of North Carolina (Appendix A, pp. 1A to 2A) is not reported. The September 2, 1980, opinion of the North Carolina Court of Appeals (Appendix B, pp. 5A to 16A) is reported at 48 N.C. App. 508, 269 S.E.2d 688 (1980). The April 11, 1979, order of the North Carolina trial court (Appendix C, pp. 19A to 28A) is not reported. The November 22, 1978, Order of the Indiana trial court in a related case (Appendix D, pp. 31A to 38A) now on appeal by the North Carolina Guaranty Association to the Court of Appeals of Indiana is not reported.

JURISDICTION OF THE SUPREME COURT

The judgment of the North Carolina Supreme Court was entered on December 4, 1980 (App. 1A).[1] This petition for certiorari is being filed within 90 days of the entry of that judgment. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 1, United States Constitution:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article I, Section 8, Clause 3, United States Constitution:

"The Congress shall have Power * * *;

"To regulate Commerce * * * among the several States, * * *;"

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[1] Subsequent references to the Appendices attached hereto will be made by "App." followed by the page number.

28 U.S.C. § 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

Set forth in Appendix E are the relevant portions of the insurance laws of Indiana and North Carolina. Those include: Ind. Code §§ 27-1-4-1, 27-1-4-2, 27-1-4-9 and 27-1-4-10 (now repealed)[2] dealing with rehabilitation of insolvent insurers; and N.C. Gen. Stat. § 58-155.69(6), which is part of the statute pursuant to which the North Carolina Guaranty Association was created.

STATEMENT OF THE CASE

This case turns on whether the judgments of the Indiana state courts resuscitating UNAC from its previous insolvency are binding on North Carolina policyholders

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[2] The old rehabilitation, liquidation and conservation chapter of the Indiana Insurance Law of which the cited sections were a part, was repealed by the 1979 Indiana General Assembly, Public Law 255, and was replaced by the new Ind. Code §§ 27-9-1-1 *et seq.*, effective September 1, 1979. The UNAC rehabilitation proceeding was governed by the old statute, which in these respects is not significantly different from the new statute.

and the North Carolina Guaranty Association. UNAC is an Indiana stock insurance company. In 1973, it was licensed to do business in 45 states, including North Carolina. In 1973 UNAC had deposited a bond in the face amount of $100,000 for the benefit of North Carolina policyholders with the North Carolina Treasurer in order to maintain its license with the North Carolina Commissioner of Insurance. The bond has remained in North Carolina ever since.

Respondent North Carolina Guaranty Association is a creature of North Carolina statute. In substance, a guaranty association—a relatively recent development in most states—is a mechanism whereby all insurance companies doing business in a given state become ultimately responsible to fulfill policy obligations of any of them who becomes insolvent or otherwise fails to honor its policies. UNAC's rehabilitation reduced UNAC's liabilities on its policies as originally written. As a result, the North Carolina Guaranty Association became contingently liable to complete those obligations to North Carolina policyholders.

The Indiana Rehabilitation Proceeding (1974-1977). On August 5, 1974, at the request of the Indiana Department of Insurance pursuant to the Indiana Insurance Law,[3] UNAC became the subject of an Order of Rehabilitation in a statutory rehabilitation proceeding in an Indiana state court ("Indiana Rehabilitation Court"). In oversimplified terms, UNAC's reserves were believed inadequate to meet its future policy obligations. The Indiana Insurance Commissioner was appointed statutory Rehabilitator by the Court. From August 5, 1974, until February 4, 1977, when UNAC was released from rehabilitation, the Rehabilitator had legal possession of the assets of UNAC and was responsible for UNAC's insurance business including the administration of UNAC's over 50,000

[3] Ind. Code §§ 27-1-4-1 and 2 (App. 42A-44A).

outstanding policies scattered around the United States and several foreign countries.

Under Indiana Insurance Law,[4] the Rehabilitator also had the obligation to take steps, with Court approval, toward the removal of the causes for the rehabilitation proceeding. That general mandate to the Commissioner is found in the insurance insolvency statutes of virtually all states. Work commenced on a "Plan of Rehabilitation"—in substance, a restructuring of UNAC's liabilities very similar to a reorganization of a general business corporation under federal bankruptcy laws. Ultimately, a Plan was entered as a judgment of the Indiana Rehabilitation Court. The release of UNAC from rehabilitation took place on February 4, 1977.

All interested persons were given notice of the rehabilitation proceeding and many intervened as parties to the proceeding. In particular, among many others, the North Carolina Guaranty Association intervened and—with other affected state guaranty associations[5]—negotiated the terms of the Plan that related to guaranty associations.[6] Other interests appeared as named parties or by representative parties (classes of policyholders and

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[4] Ind. Code § 27-1-4-2(a) (App. 43A).

[5] Only eight state guaranty associations were involved with UNAC. Several states had no guaranty association at the time. Other state guaranty associations were not involved because the particular types of insurance UNAC wrote—principally professional disability insurance—were not subject to their guaranty association laws.

[6] The North Carolina Guaranty Association had been notified by the North Carolina Insurance Commissioner of the UNAC rehabilitation proceeding on August 6, 1974—within 24 hours after the proceeding started. From time to time thereafter, the North Carolina Insurance Commissioner communicated with the North Carolina Guaranty Association about the UNAC rehabilitation proceeding, as provided by the North Carolina statute which created the North Carolina Guaranty Association.

shareholders) and several objections were filed. The policyholders as a class[7] participated actively in the rehabilitation process and the hearings before the Indiana Rehabilitation Court.

After extensive negotiations, provisions in the Plan were agreed to by the guaranty associations and the Rehabilitator and were incorporated in a proposed plan tentatively approved by the Indiana Rehabilitation Court on July 19, 1976, after a hearing at which the North Carolina Guaranty Association was present and participated. In August 1976, the Rehabilitator mailed detailed information about the status of the rehabilitation proceeding to all parties, including the North Carolina Guaranty Association, the North Carolina Insurance Commissioner and all policyholders. The mailing to the parties included (a) a detailed notice of a final hearing scheduled for October 14, 1976, (b) a copy of a tentative rehabilitation plan for UNAC, and (c) in the case of policyholders, a data sheet describing the policyholder's policy and the amounts the policyholder would receive under the tentative plan.

On October 12, 1976, the North Carolina Guaranty Association and the seven other guaranty associations filed

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[7] The Indiana rehabilitation statute, which predates federal and state class action rules, contemplates that policyholders may be parties by representation apart from the rules of civil procedure. In addition, current Indiana Trial Rule 23 is a mirror of Federal Rule 23. After the Indiana Rehabilitation Court entered its policyholder class certification order under Rule 23 on October 30, 1975, the first of many notices was sent to all 50,000 UNAC policyholders on December 10, 1975. There were no policyholder subclasses and no geographic restrictions upon the class's representation by counsel. The class consisted of "all persons who are or have at any time been holders of contracts of insurance" with UNAC. All North Carolina policyholders were class members and, therefore, parties under Trial Rule 23. None "opted out." No policyholder objected to the classifications or requested subclasses to be established.

a pleading entitled "Information to the Court and Petition for Approval of Mailing to Certain Policyholders of UNAC and Approval of Concept of Service Contract Between Guaranty Associations and UNAC." The guaranty associations asked the Indiana Rehabilitation Court to approve a form letter to policyholders in the eight guaranty association states and to approve the concept of a service contract between UNAC and each of the guaranty associations. The contract would provide for UNAC to continue to administer the insurance policies as to which the guaranty associations had obligations. The guaranty associations' request was granted by the Indiana Rehabilitation Court.

After a hearing on October 14, 1976, at which the North Carolina Guaranty Association was present and participated, the Indiana Rehabilitation Court issued its Final Judgment, which included a final Plan of Rehabilitation ("Plan"), on November 22, 1976. Substantial changes were mandated in UNAC's contractual relationships with its policyholders, agents and creditors, as well as in UNAC's management structure. Policyholders were given the option of receiving the liquidated value of their policies or continuing their policies with UNAC on a reduced benefit-increased cost basis. One provision of the Plan dealt specifically with the eight guaranty associations involved. The Final Judgment, among many other items (a) expressly found that the court had jurisdiction over all policyholders and their representative guaranty associations, (b) compromised all policyholders' claims against UNAC whether or not the policyholder was a member of a Rule 23 certified class (as all North Carolina policyholders were), and (c) provided that after the specified Court-directed changes in the obligations between UNAC and each of the guaranty associations, "UNAC shall have no further obligation or liability to any guaranty association." No appeal was taken from the Indiana Rehabilitation Court's 1976 Final Judgment.

UNAC has now implemented the Plan in all states of the United States and in Canada and has resumed possession of its property and the conduct of its business as a privately operated Indiana stock insurance company. UNAC is not (and was not at any time after February 4, 1977, when the rehabilitation proceeding terminated) in default of any policyholder contracts as those contracts were revised by the Indiana Rehabilitation Court.

The Guaranty Association's Post-Rehabilitation Petition (June 1977). On June 8, 1977, UNAC and the eight guaranty associations filed a "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations." By their joint petition, UNAC and the guaranty associations—including the North Carolina Guaranty Association—asked the Indiana Rehabilitation Court for permission to execute a Service Contract in the form attached to the petition. On June 14, 1977, the Indiana Rehabilitation Court directed UNAC and each of the guaranty associations to do all acts reasonably necessary or appropriate to implement and carry out the form Service Contract. Basically, the Service Contract provided for UNAC to continue to administer the insurance policies of policyholders residing in guaranty association states, with the guaranty associations paying UNAC a service fee for doing so. The guaranty associations (rather than the policyholders) were to pay UNAC any future premium increases (prior to rehabilitation, UNAC's policies did not permit such increases). The guaranty associations were to pay directly to policyholders any policy benefits which were cancelled by the Plan.

The North Carolina Suit (January 1978). The other seven guaranty associations abided by the Indiana Rehabilitation Court's Order of June 14, 1977. The North Carolina Guaranty Association first attempted to change the prescribed form of Service Contract (which it had petitioned the Indiana Rehabilitation Court to approve) by

adding a new paragraph about the North Carolina deposit on the last page. That effort was not agreed to by UNAC and was subsequently held void by the Indiana Rehabilitation Court. In December 1977, UNAC expressed its view that the Indiana Rehabilitation Court's Final Judgment had already adjudicated the North Carolina Guaranty Association's rights or lack of rights in the deposit. The North Carolina Guaranty Association then filed this case in January of 1978 in a North Carolina state court naming UNAC and the North Carolina Insurance Commissioner and Treasurer as defendants. The complaint sought to obtain for the benefit of the North Carolina Guaranty Association, as claimed assignee of the rights of North Carolina policyholders, the $100,000 deposit made by UNAC in North Carolina in 1973. The North Carolina Insurance Commissioner and Treasurer, though nominal defendants in the lawsuit, filed a cross-claim against UNAC seeking the same sort of relief requested by the North Carolina Guaranty Association.

The Indiana Petition for Instructions (July 1978). After the North Carolina lawsuit was filed, UNAC was faced with the prospect of having to make payments to the North Carolina Guaranty Association out of the treasury of UNAC under the Service Contract, at the same time that the North Carolina Guaranty Association was, in UNAC's view, ignoring the orders of the Indiana Rehabilitation Court and the rights of policyholders outside North Carolina.[8] UNAC filed a Petition for Instructions with the

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[8] The $100,000 deposit was included in the general assets of UNAC under Part V of the Plan. As a result, the deposit is held for the benefit of all policyholders unless and until there is a post-rehabilitation default by UNAC. No party—including the North Carolina Guaranty Association itself—made *any* objection to Part V of the Plan or suggested *any* changes. And, one of the hallmarks of the Plan was that, absent objections, all policyholders everywhere were to be treated equally so that UNAC could be successfully rehabilitated.

Indiana Rehabilitation Court on July 13, 1978. After notice to all affected parties, a hearing was held on September 20, 1978, before the Indiana Rehabilitation Court. Both the North Carolina Guaranty Association and UNAC appeared.

On November 22, 1978, an Order (App. 31A, 38A) was entered providing, *inter alia*:

> "2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.
>
> "3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. * * *
>
> "4. The claims asserted in the North Carolina lawsuit commenced by the North Carolina Association against Underwriters would result in a violation of the orders of this Court. * * *"

That Order has been appealed by the North Carolina Guaranty Association to the Court of Appeals of Indiana. The case is fully briefed, but no appellate decision has as yet been rendered.

Proceedings in the North Carolina Courts. After the Indiana Rehabilitation Court had thus spoken a second time on the subject of UNAC's North Carolina deposit, the North Carolina Guaranty Association, and the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment in the North Carolina

state court action. UNAC filed a cross motion for summary judgment. Affidavits and briefs were submitted by both sides and a hearing was held in the North Carolina state court on March 19, 1979. UNAC raised its res judicata and full faith and credit defenses in its answer to the North Carolina complaint and cross-claim, and also affirmatively asserted those defenses in support of its motion for summary judgment.

On April 11, 1979, the North Carolina trial court entered summary judgment for the North Carolina Guaranty Association (App. 19A). That order held that despite the contrary rulings of the Indiana Rehabilitation Court in 1976 and 1978, UNAC's North Carolina deposit could be applied to meet pre-rehabilitation obligations owed by UNAC to North Carolina policyholders.

UNAC appealed to the North Carolina Court of Appeals, raising again its constitutional and statutory defenses. In an opinion dated September 2, 1980 (App. 5A), the Court of Appeals affirmed the decision of the North Carolina trial court, saying in the crucial paragraph (App. 15A) that the Indiana Rehabilitation Court did not have the necessary personal jurisdiction over the North Carolina Insurance Commissioner and Treasurer, and that since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding.

On October 6, 1980, UNAC timely filed a Notice of Appeal and Alternative Petition for Discretionary Review in the Supreme Court of North Carolina, raising again its constitutional and statutory defenses, as well as pointing out the interstate commerce implications of the Court of Appeals' interpretation of North Carolina law. By judgment entered on December 4, 1980 (App. 1A), the Supreme Court let the opinion of the North Carolina Court of Appeals stand.

REASONS FOR GRANTING THE WRIT

The Decision Of The North Carolina Courts Conflicts With The Decision Of This Court In Pacific Mutual And Other Applicable Full Faith And Credit And Commerce Clause Decisions On An Important Point.

This is a classic case for the exercise of this Court's role as "umpire" of the federal system. The decisions of the North Carolina courts require this Court's review because they conflict with the decisions of the Court implementing the full faith and credit clause as well as with the plain language of that clause. And even if there were no such conflict, the case presents an issue of major importance—whether the decisions of the domiciliary state of an impaired insurer are to be given nationwide effect.

There is no federal law governing insurers' delinquency proceedings. The Bankruptcy Code expressly does not apply to insurance companies (11 U.S.C. § 109(b)), and there is no other federal statutory law dealing with the problems of insolvent or otherwise delinquent insurers. Therefore, it is entirely up to the states to handle the problems of rehabilitation and liquidation of insurance companies. It is obvious, however, that the adjustment of rights as between citizens of states with differing laws of property and creditors' rights is just as important with respect to insolvent insurance companies notwithstanding the states' historical role in regulation of insurance. And the solution of these problems, absent federal legislation, requires the utmost degree of interstate cooperation and the deference to the regulatory laws of the domiciliary state of the insurance company. Those principles have been recognized by this Court throughout the twentieth century.

It is indisputable that a plan of rehabilitation adopted by one state court can constitutionally alter the pre-rehabilitation obligations of the multi-state insurer to policyholders, shareholders, agents, and others, as long as

each is given the option (as was done here) to elect to take a liquidation value instead of continuing with the rehabilitated company. The most comprehensive authority on the subject of the alteration of pre-rehabilitation rights comes from the various court decisions concerning the rehabilitation of the Pacific Mutual Life Insurance Company of California in the late 1930's. Opinions in three cases (one each in North Carolina, Illinois and Wisconsin),[9] repulsed collateral attacks on the California rehabilitation. However, the California Supreme Court decision in *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.*, 10 Cal.2d 307, 74 P.2d 761 (1937), and its affirmance in this Court in *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170 (1938), remain today the landmark decisions in the rehabilitation area and the guiding light for insurance regulators. The Pacific Mutual doctrine clearly establishes that a plan of rehabilitation, such as that adopted for UNAC, constitutionally and effectively compromises and adjusts all pre-rehabilitation rights, even though all persons with such rights are not made parties to the rehabilitation proceeding except by representation.[10]

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[9] *Taylor v. Pacific Mut. Life Ins. Co. of Cal.*, 214 N.C. 770, 200 S.E. 882 (1939); *Larson v. Pacific Mut. Life Ins. Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698, 61 S.Ct. 137 (1940); and *Padway v. Pacific Mut. Life Ins. Co. of Cal.*, 42 F.Supp. 569 (E.D. Wis. 1942).

[10] Just as the policyholders in the Pacific Mutual rehabilitation were forced to accept an alteration of their contract rights, shareholders of an insolvent insurance company have been forced to accept a complete nullification of their equity interest in the company. *In re American Investors Assurance Co.*, 521 P.2d 560 (Utah 1974). Agents have likewise had their relationship with troubled insurance companies changed by courtapproved plans of rehabilitation. *People v. Peoria Life Ins. Co.*, 376 Ill. 517, 34 N.E.2d 829, *cert. denied*, 314 U.S. 688, 62 S.Ct. 300 (1941); and *Liberty Nat'l Ins. Co. v. Reinsurance Agency, Inc.*, 307 F.2d 164 (9th Cir. 1962). *See also, National Surety Corp. v. Nantz*, 262 Ky. 413, 90 S.W.2d 385 (1936); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1311 (1977); *Hutchins v. Pacific Mut. Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938); *Morris v. Investment Life Ins. Co. of America*, (1965) 1 Ohio App.2d 330, 204 N.E.2d 550 (1965); and *Neblett v. Pacific Mut. Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802, 64 S.Ct. 428 (1944).

Equally without dispute is that each state must give full faith and credit to proceedings under another state's statutes similar to the statutory insolvency proceeding in Indiana to which UNAC was subject. And federal and state courts and officers must defer to domiciliary state dissolution proceedings and the rights of statutorily-appointed insolvency receiver in the insolvent company's home state. *See Relfe v. Rundle*, 103 U.S. 222 (1880); *Converse v. Hamilton*, 224 U.S. 243, 32 S.Ct. 415 (1912); *Broderick v. Rosner*, 294 U.S. 629, 55 S.Ct. 589 (1935); *Clark v. Willard*, 292 U.S. 112, 54 S.Ct. 615 (1934); *Commonwealth Of Pennsylvania v. Williams*, 294 U.S. 176, 55 S.Ct. 380 (1935); *Gordon v. Ominsky*, 294 U.S. 186, 55 S.Ct. 391 (1935); and *Penn Gen. Cas. Co. v. Commonwealth*, 294 U.S. 189, 55 S.Ct. 386 (1935). *In accord, Genecov v. Wine*, 109 F.2d 265 (8th Cir. 1940); and *American Cast Iron Pipe Co. v. Statesman Ins. Co.*, 343 F.Supp. 860 (D. Minn. 1972).

All potential claimants were given notice of the UNAC Plan and an opportunity to be heard. Until the Indiana Rehabilitation Court resolved the matter, the remedies available to North Carolina policyholders or any other creditor under state laws could be asserted. In particular, the North Carolina deposit could have been subjected to attachment or other process in North Carolina *before* UNAC was released from rehabilitation. That is what the *Gold* decision upon which the North Carolina courts rely stands for (App. 15A). If that had been done, then the Indiana Rehabilitation Court could have taken that action into account in making special provisions for North Carolina policyholders—in effect setting off their special North Carolina law benefits. But no such effort was instituted in the State of North Carolina or anywhere else. To the contrary, North Carolina policyholders and the North Carolina Guaranty Association elected to

participate in the rehabilitation Plan on the same basis as everyone else.[11]

But once reduced to judgment, the Indiana Rehabilitation Court's Final Judgment and Plan settled all pre-rehabilitation claims. And once the rehabilitation process was concluded and a Plan was approved in accordance with the procedures established by the Indiana Rehabilitation Court's orders under Indiana law, the rehabilitated UNAC was entitled to start its business with a clean slate, unencumbered by the threat of successful future lawsuits based on past wrongs.

The North Carolina Guaranty Association's 1978 complaint against UNAC and the cross-claims of the North Carolina Commissioner and the North Carolina Treasurer represent an effort to do just what common sense and the overwhelming legal precedents just cited prohibit: resurrect pre-rehabilitation claims in a court other than the Indiana Rehabilitation Court.

Despite the North Carolina Court of Appeals' recognition (App. 13A) in its opinion that "pre-rehabilitation

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[11] There are a number of reasons why a party with an interest in the North Carolina deposit might choose to give up that interest and participate instead in the rehabilitation in Indiana. First, the cost of administering a separate rehabilitation or liquidation in North Carolina would be substantial. That fact led the Canadian authorities to go along with the Plan, even though UNAC had a disproportionately large amount of assets on deposit in Canada and Canadian policyholders would have fared better than U.S. policyholders in a liquidation. Second, the Plan gave policyholders (and the North Carolina Guaranty Association as their assignee) certain contingent rights to recoup their losses.

Those included an initial cash distribution, a share of a $2.5 million limited RPR benifet, a share in any third-party litigation recoveries, and, for the eight guaranty associations, a share of future profits. Finally, the Plan offered policyholders the assurance of uninterrupted insurance coverage with UNAC. Whether the $100,000 in North Carolina could economically be run as a separate mini-insurance company insuring the approximately 30 policyholders in that state is problematic at best.

contractual rights" can be modified by a plan of rehabilitation and that pre-rehabilitation claims against the rehabilitated company's "general assets" cannot be tolerated, the decision nevertheless goes on to draw a distinction concerning "statutory rights" and "special deposits." But the Indiana court treated all assets—including the North Carolina deposit—as "general assets." The time and place to challenge that decision was (a) in Indiana, and (b) before the judgment was implemented.

That distinction, which is the only stated justification for the action of the North Carolina courts in ignoring the 1976 and 1978 judgments of the Indiana Rehabilitation Court, is contained in the following single paragraph on the last two pages of the opinion (App. 15A):

> "It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. Continental Bank and Trust Co. v. Gold, 140 F.Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the Court in Indiana. Because the Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata*."

Those two ideas—that the deposit was not physically (and thus jurisdictionally) in Indiana and that the North Carolina Insurance Commissioner and Treasurer were not parties to the Indiana rehabilitation proceeding—form the purported legal foundation for the North Carolina Court of Appeals' conclusion that what the Indiana Rehabilitation Court said and did was not binding so far as policyholder rights in the North Carolina deposit were concerned because the Indiana Rehabilitation Court lacked "jurisdiction."

This "jurisdictional" construct is defective as a matter of federal constitutional law. First, every Indiana insurance company upon qualifying to do business in a state, carries into that state the rehabilitation provisions of Indiana law, Ind. Code §§ 27-1-4-1, -2, -9 and -10 which, among other things, permit the courts of Indiana to restructure claims against the company. That has been the law for over 100 years. As this Court said in *Relfe v. Rundle*, 103 U.S. 222, 226 (1880):

> "* * * Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In accord, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 67 S.Ct. 1355 (1947). In short, North Carolina was required to give full faith and credit to the rehabilitation statute of the state of UNAC's incorporation.

In *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963), this Court discussed in some detail these res judicata and full faith and credit principles in the context of a two-state dispute over the ownership of land. Mr. Justice Stewart

pointed out that a judgment of a court in one state is constitutionally binding in the second state provided the court in the first state had the jurisdiction to render the judgment. 375 U.S. at 110, 84 S.Ct. at 244. The Court then said:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that *a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.*"

375 U.S. at 111, 84 S.Ct. at 245. (Emphasis added.)

Under *Durfee*, the North Carolina trial court in 1979 was required to follow the 1978 judgment of the Indiana Rehabilitation Court that any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Guaranty Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the Final Judgment and the Plan. That judgment was entered after the North Carolina Guaranty Association's jurisdictional defenses had been "fully and fairly" litigated in the Indiana Rehabilitation Court on UNAC's 1978 Petition for Instructions.

More importantly, the rights of those beneficially interested in the deposit in North Carolina—North Carolina policyholders and the North Carolina Guaranty Association—were fully adjudicated in Indiana in *1976*. That determination is entitled to res judicata effect in North Carolina. The only "statutory" right under the North

Carolina deposit statute is a right in the event of a contract breach by the insurer. By reason of the Indiana rehabilitation proceeding and the Final Judgment of the Indiana Rehabilitation Court, after UNAC was released from rehabilitation *there was and is no policyholder in North Carolina who had or has any contract breach claim.* All pre-1976 claims were compromised in 1976 by Indiana court action. The North Carolina Insurance Commissioner and Treasurer are plainly mere stakeholders or escrow agents; they are in no sense owners of beneficial interests in a deposit which was held for policyholders only. The beneficial rights in the deposit were adjudicated in Indiana and that judgment must be given full faith and credit, even though the deposit physically stayed in North Carolina. The "res" does not have to be in the jurisdiction for the jurisdiction's judgments to be entitled to constitutional protection. This Court so held in *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310 (1929), and *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 858, *reh. den.*, 330 U.S. 854, 67 S.Ct. 858 (1947). *In accord, Continental Bank and Trust Co. v. Apodaca*, 239 F.2d 295 (10th Cir. 1956).

Because of the 1976 decision of the Indiana Rehabilitation Court, UNAC is not currently in default of any contractual obligation to policyholders in North Carolina or anyplace else. The only way for North Carolina to say that UNAC today is an "impaired insurer" under its statute, N.C. Gen. Stat. § 58-155.69(6) (App. 45A), is to ignore the Final Judgment of the Indiana Rehabilitation Court. That Final Judgment took UNAC out from under the 1974 Order of Rehabilitation and made UNAC no longer subject to it. That Judgment dealt with the problems that brought about the need for a long and difficult rehabilitation proceeding in Indiana, and as such, it is res judicata. The North Carolina Guaranty Association had no right to use a North Carolina statute to take the $100,000 deposit from a solvent company. UNAC has implemented the Plan and is no longer insolvent. UNAC is not in default

of its insurance contracts with North Carolina policyholders or any other policyholders, as those policies were restructured by the Plan. The Plan has been approved, with the North Carolina Guaranty Association participating actively, and the orders of the Rehabilitation Court are now res judicata against the North Carolina Guaranty Association and the policyholders through whom it seeks to assert a claim. The only way to reach a contrary result is to ignore Indiana law.

Finally, it goes without saying that for a variety of constitutional and practical reasons, the Insurance Commissioner and Treasurer of a sister state almost certainly could not be made parties to a rehabilitation proceeding in the state of domicile.[12] Any interpretation of North Carolina law that has the effect of suggesting that the Insurance Commissioner or Treasurer has substantive rights in UNAC's North Carolina deposit that cannot be adjudicated somewhere else is not only a violation of the constitutionally required full faith and credit that must be given to the Indiana law and the judgments of the Indiana Rehabilitation Court; it is also an unconstitutional burden upon interstate commerce. The North Carolina Court of Appeals for the first time announced its novel and unprecedented views as to the purported jurisdictional

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[12] The Court's recent opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710 (1979), did not have to reach the constitutional question raised by the assertion of personal jurisdiction by the trial court in one state (Texas) over government officials responsible for enforcement of the state takeover statute in a second state (Idaho). However, the Court's opinion in *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690 (1978), and the Court's other personal jurisdiction decisions since *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), cast considerable doubt on the constitutionality of an attempt by a court in one state to subject to suit in that state the nonresident state officials of a second state acting in their governmental capacity. *See also Turner v. Baxley*, 354 F.Supp. 963 (D. Vt. 1972), and *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171 (D. Idaho 1976).

deficiency of the Indiana Rehabilitation Court, because of the absence from Indiana of the North Carolina deposit and the North Carolina state officers. But this doctrine, if valid, renders impossible the rehabilitation of a multi-state insurer. Moreover, it is clear on the face of the North Carolina statute that the policyholders were the only persons who ever had any legitimate claims to the deposit. And it is equally clear that the North Carolina Insurance Commissioner was given notice of—if not made a party to—the rehabilitation proceeding from its inception. By twisting North Carolina law, the courts of that State have put an unconstitutional barrier in the conduct of interstate insurance by companies with assets and liabilities in many states. *Cf.* Horowitz, *The Commerce Clause As A Limitation On State Choice-Of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971). That barrier can only be eliminated by this Court's issuance of a writ of certiorari.

CONCLUSION

For the above reasons, the Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of North Carolina affirming the decision of the Court of Appeals of North Carolina.

Respectfully submitted,

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Counsel for the Petitioner

Appendices

APPENDIX A

No. 60PC TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1980

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NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION	)	
v	)	
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA	)	JUDGMENT DISMISSING APPEAL ON MOTION OF PLAINTIFF AND DENYING PETITION FOR DISCRETIONARY REVIEW
	)	(7910SC76)

****

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 2nd day of December 1980 that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that Defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this *4th* day of *December, 1980.*

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme Court of
North Carolina

cc: North Carolina Court of Appeals
Allen, Steed & Allen, Attorneys at Law
Purrington & Purrington, Attorneys at Law
Baker & Daniels, Attorneys at Law
Richard L. Griffin, Assistant Attorney General

APPENDIX B

NO. 7910SC766

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 1980

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION	)	
v.	)	Wake County No. 78CVS174
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA	)	

Appeal by defendant Underwriters National Assurance Company from Bailey, Judge. Judgment entered 11 April 1979 in Superior Court, Wake County. Heard in the Court of Appeals 29 February 1980.

On 12 January 1978 plaintiff (hereinafter Guaranty Association) filed a complaint against defendant, an insurance company domiciled in Indiana (hereinafter UNAC) seeking a judgment declaring the Guaranty Association's right to have a deposit, made by UNAC, applied to meet UNAC's obligations to North Carolina policyholders. The facts leading up to this complaint are as follows: UNAC was qualified to do business and was carrying on the business of selling accident and disability insurance in North Carolina until 4 October 1974, when UNAC voluntarily withdrew from doing business in North Carolina. In June 1973 the North Carolina Insurance Commissioner informed the President and Chairman of the Board of UNAC, that a $100,000 deposit for the protection

of North Carolina policyholders would be required as a condition to allowing UNAC to do business in North Carolina. UNAC made the required $100,000 deposit on 27 September 1973, which was registered as follows: "Treasurer of the State of North Carolina in trust for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes." That deposit continues to be held by the North Carolina Insurance Commissioner.

In 1974 the Indiana Department of Insurance concluded that UNAC's reserves were inadequate to meet policy obligations and decided to take action in the Indiana Courts to petition for rehabilitation of UNAC on 5 August 1974.

The Rehabilitator undertook the administration and rehabilitation of UNAC under the supervision of the Superior Court of Marion County, Indiana. As the rehabilitation progressed, the North Carolina Commissioner advised the Guaranty Association of developments bearing upon its obligations to North Carolina policyholders.

On 10 December 1975, notices were mailed to all policyholders, including the policyholders then in North Carolina regarding conditional policyholder class representation or exclusion therefrom. This notice to policyholders provided in part: "Any person so requesting exclusion will not participate in any recovery of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. As a policyholder, however, he may be bound by a judgment effecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding."

On 27 May 1976 the Rehabilitator sent a formal notice to the state insurance guaranty associations and directed their attention to part X(C) of the proposed plan dated 23

April 1976. This notice was also sent to the North Carolina Insurance Commissioner. The last paragraph of part X(C) provided:

> The guaranty associations in some states may have obligations to UNAC policy owners as a result of the UNAC rehabilitation proceeding. Moreover, to the extent such guaranty associations do have obligations, there is a possibility that these guaranty associations may seek to recover from UNAC sums paid to UNAC policy owners. The Rehabilitation Plan should resolve UNAC's contingent liability to any guaranty association by determining that UNAC has no further obligation or liability to any guaranty association.

On 8 June 1976 the Guaranty Association together with other state guaranty associations moved to intervene in the Indiana rehabilitation proceeding in "an effort not only to protect the rights of the Guaranty Associations, but also to accommodate the Petitioner (Rehabilitator) in his efforts to effectuate an orderly and equitable rehabilitation of the Respondent (UNAC)." The Guaranty Association was permitted to intervene in the rehabilitation proceeding and was represented by counsel at a hearing on 9 June 1976 concerning the proposed plan of rehabilitation. At the hearing the Guaranty Association objected to the provisions of the initial plan and made suggested changes. These suggested changes were agreed to by the Rehabilitator and were incorporated into a proposed plan tentatively approved by the rehabilitation court on 19 July 1976.

Subsequently, the intervening guaranty associations asked the rehabilitation court to approve a form letter to policyholders residing in North Carolina and seven other states and to approve in concept a service contract which would provide for UNAC to continue to administer the

insurance policies on which each intervening guaranty association had obligations. The request of the intervening guaranty associations was granted by the rehabilitation court.

On 22 November 1976 the rehabilitation court entered an Order and Memorandum Approving the Plan of Rehabilitation in Settlement of Claims and Litigation. Part of the order provided in part:

> In consideration of the provisions of the Rehabilitation Plan, the claims of the UNAC policy owner class representatives are compromised and dismissed.... Whether or not any policy owner is a member of a class pursuant to Trial Rule 23, in order to fix and determine UNAC's obligations after rehabilitation, all claims of UNAC policy owners against UNAC are compromised and dismissed....

The order of rehabilitation allowed UNAC to increase the guaranty premiums on the noncancellable disability insurance policies. The order of rehabilitation also cancelled obligations owed by UNAC pursuant to the return of premium rider which provided that if no claim was made under the policyholder's basic insurance coverage for a period of ten years, most of the premiums paid during that 10 year period would be returned to the policyholder. The policyholders having return of premium riders were entitled to receive 15.68% of the additional amount paid for the return of premium rider prior to the insolvency date and were entitled to no return on the basic policy premium.

Paragraph 1 of the rehabilitation court's findings of fact in the order approving the final plan of rehabilitation provided: "The Court has jurisdiction over the subject matter and over the parties, including UNAC,...all UNAC policy owners,...State Insurance Guaranty Associations..." In its order, the court stated:

> To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims of litigation by any past or present UNAC policy owners,... against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed.

On 8 June 1977 the UNAC and the eight intervening guaranty associations filed a joint "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations." On 14 June 1977 the rehabilitation court gave its permission to do all acts reasonably necessary or appropriate to implement and carry out an approved Service Contract. UNAC then sent the Guaranty Association the courtapproved Service Contract. The Guaranty Association added the following language to the Service Contract without the approval of the rehabilitation court:

> It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters with the Commissioner of Insurance of North Carolina, including deposits understood to total... $100,000, which rights and remedies are governed by North Carolina law.

The Guaranty Association's president signed this altered document on 13 October 1977 and returned it to UNAC. Thereafter the President of UNAC returned the executed Service Contract accompanied by a letter of transmittal. In the letter the President indicated that he understood that

the added paragraph was designed simply to recite that neither the Guaranty Assocation nor UNAC had waived any claims that it may have in connection with the North Carolina deposits. The President then indicated that UNAC took the position that Guaranty Association had no claims to the deposit, since the plan of rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. After receiving this letter the Guaranty Association filed its complaint in North Carolina for declaratory judgment.

In its answer UNAC alleged that the Indiana Court's rehabilitation order should be given full faith and credit; that the security deposit at issue was an asset of UNAC and subject to the jurisdiction of the rehabilitation court; that the Guaranty Association acknowledged jurisdiction of the rehabilitation court by appearing in said rehabilitation proceedings; and that the rehabilitation order was *res judicata*.

On 13 July 1978 UNAC filed a Petition for Instructions with the Rehabilitation Court concerning the impact of the North Carolina action. After notice and hearing on this petition, an order was entered on 22 November 1978. The Indiana Court concluded:

> The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policy owner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

The Guaranty Association appealed this Order, and that appeal is still pending.

After the Indiana Court had acted, Guaranty Association, the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment. On 12 March 1979 UNAC also filed a motion for summary judgment. On 11 April 1979 the trial court entered summary judgment for the Guaranty Association.

Allen, Steed and Allen, by William S. Patterson, Charles D. Case and Ann Hogue Pappas for the plaintiff.

Purrington, McNamara & Pipkin, by Ashmead P. Pipkin, for the defendant Underwriters National Assurance Company.

MARTIN (Robert M.), Judge.

The question presented for review is whether plaintiff's motion for summary judgment was properly granted. This is a proper case for a declaratory judgment, G.S. 1-254, and the Guaranty Association is entitled to maintain the action. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972). The propriety of a summary judgment in such action is governed by the same rules applicable to other actions, G.S. 1A-1, Rule56(a) and (b) and 57. Here, there is no substantial controversy as to the facts disclosed by the evidence and the legal significance of those facts presents the questions in dispute. It was unnecessary for the Guaranty Association to show that it had suffered any loss or had any right impaired in order to maintain the action. Rather, the Association had to show that it would ultimately suffer a loss or have a right impaired. Newman Machine Co. v. Newman, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E. 2d 63 (1969).

The trial court entered an order which found "specified facts without substantial controversy," made conclusions of law and ordered that:

1. The UNAC policyholders residing in North Carolina on August 5, 1974, are entitled to have

the deposit made by UNAC for the sole protection of North Carolina policyholders liquidated and to have the proceeds applied to meet the pre-rehabilitation obligations owed to them by UNAC to the extent those obligations were defaulted upon as a result of the insolvency of UNAC and the subsequent rehabilitation proceeding in Indiana.

2. To the extent that the proceeds of the deposit made by UNAC for the sole benefit of North Carolina policyholders fulfill the contractual obligations owed by UNAC to North Carolina policyholders, the Guaranty Association is not liable to North Carolina UNAC policyholders under the Guaranty Act.

3. UNAC has no interest in the deposit made by it in North Carolina for the sole benefit of North Carolina policyholders except in such sums as remain after the sale of the deposited securities and application of the proceeds for payment of all preinsolvency obligations owed by UNAC to policyholders residing in North Carolina on August 5, 1974.

4. This Court shall retain jurisdiction in order to grant such further supplemental relief based on the declaratory judgment herein rendered, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Guaranty Association.

5. The Commissioner of Insurance shall promptly proceed to liquidate the deposit made by UNAC for the benefit of North Carolina policyholders and apply the proceeds to meet the pre-rehabilitation obligations owed by UNAC to North Carolina policy-holders.

6. The counterclaim of UNAC against the Guaranty Association requesting damages incurred by reason of frivolous and improper acts of the Guaranty Association in commencing this action is hereby dismissed.

The crux of UNAC argument is that any claim against it, or its assets were compromised during rehabilitation in the Indiana Court and the judgment discharging the company's liability for all claims which the court did not allow is *res judicata* and entitled to full faith and credit as required by the United States Constitution. The authorities cited by UNAC support the proposition that pre-rehabilitation contractual rights that were modified pursuant to a plan of rehabilitation cannot be enforced by resorting to the general assets of the rehabilitated insurance company.

The Guaranty Association contends that the rights of North Carolina policyholders and, through subrogation, the Guaranty Association are not contractual rights and that their claims are statutory rights. They argue that these statutory rights are based upon the laws of North Carolina dealing with deposits made by non-domestic insurance companies for the protection of North Carolina policyholders.

The Guaranty Association is an organization created by statute to which all life, accident and health insurers doing business in North Carolina are required to belong. When an insurance company doing business in North Carolina becomes insolvent, it is the Guaranty Association's duty to see to it that all contractual obligations owed to North Carolina policyholders are fulfilled. Absent the availability of deposits or assets that can be used to meet the contractual obligations of the insolvent insurer, the Guaranty Association must assess its member companies and use those assessments to fulfill the contractual obligations of the insolvent insurer.

G.S. 58-155.66 in describing the purpose of the Guaranty Act states: "To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages...." G.S. 58-155.68, in addressing the construction to be given the Guaranty Act, states: "This article shall be liberally construed to effect the purpose under G.S. 58-155.66 which shall constitute an aid and guide to interpretation." Section 58-155.72(9)(a) of the Guaranty Act specifically contemplates payments by the Guaranty Association for payments of contractual obligations or continuation of coverage and states that the Guaranty Association shall be subrogated to rights against the assets of any impaired insurer for such payments.

The Guaranty Association seeks a judgment declaring the Guaranty Association's right to have UNAC's deposit applied to meet UNAC's obligations to North Carolina policyholders and excluding UNAC from any interest in the deposit except as to any interest that might remain after the deposit is applied to payment of the contractual obligations of UNAC to residents of North Carolina.

> G.S. 58-155.69(6) defines "impaired insurer" as:
>
> an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction...

Thus, despite the fact that UNAC has been rehabilitated, it is an impaired insurer and its defaulted obligations continue to exist for purposes of the Guaranty Act.

G.S. 58-155.78(c) provides that the Guaranty Association is deemed a creditor of the impaired insurer to the extent of assets of the impaired insurer attributable to covered policies, reduced by any amount to which the Guaranty Association is entitled by subrogation.

The Guaranty Association acknowledged its statutory liability to North Carolina UNAC's policyholders with regard to the increase in guaranteed premiums and the default on the return of premium riders allowed by the Rehabilitation Order.

It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. Continental Bank and Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the Court in Indiana. Because the Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata.*

The Guaranty Association will ultimately be required to pay the policyholders pursuant to its statutory liability. Once paid, the Guaranty Association will become subrogated to any rights of these policyholders in the deposit under G.S. 58-155.72 (9)(a). Consequently, it may assert those rights at this time in a declaratory action.

Having thus determined that the North Carolina policyholders are protected by the special deposit made by UNAC and also by the statutory liability of the Guaranty Association, we hold that it is proper that the deposit of the

defaulting company should first be applied to the loss to the policyholders rather than the Guaranty Association whose members will ultimately be required to pay the remaining claims of the policyholders pursuant to their statutory liability.

In light of Guaranty Association's assumption of liability with regard to UNAC defaults, it had clearly defined rights in the deposits made by UNAC by its statutory subrogation rights. G.S. 58-155.72(9). It seeks no more than it and the North Carolina policyholders are entitled to under the North Carolina Statutes. The Court declared those rights and in its decision we find no error.

No error.

Judges CLARK and ERWIN concur.

APPENDIX C

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 78 CVS 174

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION,	)	
Plaintiff	)	
v.	)	ORDER
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, and HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,	)	
Defendants.	)	

THIS CAUSE coming to be heard and having been heard before James H. Pou Bailey, Judge Presiding, at the March 19, 1979, Non-jury Civil Session of the Wake County Superior Court on the motions for summary judgment of the Plaintiff, North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"), and on the motions for summary judgment of the Defendants, Underwriters National Assurance Company ("UNAC"), John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner of Insurance"), and Harlan E. Boyles, Treasurer of the State of North Carolina ("Treasurer"); and the Court at the hearing of the motions, by examining the pleadings and the

evidence before it, and by examining the briefs submitted by the parties, and by interrogating counsel, having ascertained what material facts exist without substantial controversy, hereupon makes this order specifying the facts that appear to be without substantial controversy and setting forth the requisite conclusions of law as follows:

SPECIFIED FACTS WITHOUT SUBSTANTIAL CONTROVERSY

1. Prior to August 5, 1974, Underwriters National Assurance Company ("UNAC"), an insurance company organized under the laws of Indiana, transacted the business of insurance in North Carolina.

2. As a result of the questionable financial condition of UNAC, George E. King, then Deputy Commissioner and Chief Examiner of the North Carolina Department of Insurance, by letter dated June 13, 1973, informed Ralph K. Lindop, then President and Chairman of the Board of UNAC, that a $100,000 deposit for the protection of North Carolina policyholders would be required by the North Carolina Department of Insurance ("Department of Insurance") as a condition to allowing UNAC to do business in North Carolina. By letter dated June 18, 1973, from Mr. Lindop to Mr. King, UNAC stated that it was taking the necessary steps to have $100,000 in securities transferred to the North Carolina Department of Insurance to be held in trust for "the sole benefit of North Carolina policyholders." By letter to George E. King dated June 19, 1973, and attachments thereto, Mr. Bruce Bowers, then Vice President and Treasurer of UNAC, described the manner in which the securities were to be transferred to, and registered in the name of, the Commissioner of Insurance, UNAC made the required $100,000 deposit, which was registered as follows:

> Treasurer of the State of North Carolina in trust for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes.

That deposit continues to be held by the Commissioner of Insurance.

3. On August 5, 1974, in response to a petition for rehabilitation by the Indiana Department of Insurance, the Marion County Superior Court ordered the Department of Insurance of the State of Indiana to take possession of the business and assets of UNAC and to conduct UNAC's business and appoint the personnel necessary to rehabilitate UNAC.

4. On August 6, 1974, the Commissioner of Insurance notified the Guaranty Association of the impairment of UNAC pursuant to Section 58-155.75 of the North Carolina Life and Accident and Health Insurance Guaranty Association Act ("Guaranty Act").

5. The Guaranty Association, along with the guaranty associations in seven other states, obtained single counsel in Indiana and, pursuant to a joint motion dated June 8, 1976, intervened in the Indiana rehabilitation proceeding involving UNAC. As a result of that intervention, the proposed plan of rehabilitation for UNAC was altered so that UNAC would have certain contingent liabilities to the guaranty associations.

6. Neither the Commissioner of Insurance nor the Treasurer appeared in the Indiana rehabilitation proceeding involving UNAC. No North Carolina policyholder appeared in the rehabilitation proceeding involving UNAC. Nor did any policyholder from a state other than North Carolina who is protected by a deposit, such as the deposit made in North Carolina, appear in the Indiana insolvency proceeding involving UNAC.

7. By order dated November 22, 1976, the Honorable Michael T. Doogan, II, Judge, Marion County Superior Court, approved a plan of rehabilitation and settlement of claims and litigation in the UNAC insolvency proceeding. Pursuant to the order of rehabilitation, UNAC was allowed to increase guaranteed premiums on certain noncancellable disability insurance policies by as much as 350 percent. The order of rehabilitation also cancelled obligations owed by UNAC pursuant to a Return of Premium Rider under which UNAC was obligated to refund 80 percent of the premiums paid by policyholders during a 10-year period if, during that period, the policyholders' claims under the policy equalled less than 20 percent of the total premiums paid. Pursuant to the order of rehabilitation, the policyholders having Return of Premium Riders were entitled to receive 15.68 percent of the amount paid for the Return of Premium Rider up to August 4, 1974, plus the full amount paid for the Return of Premium Rider after August 5, 1974.

8. The Guaranty Association is an organization created by statute in which all life, accident and health insurers doing business in North Carolina are required to belong. When an insurance company doing business in North Carolina becomes involvent, it is the Guaranty Association's duty to see to it that all contractual obligations owed to North Carolina policyholders are fulfilled. Absent the availability of deposits or assets that can be used to meet the contractual obligations of the insolvent insurer, the Guaranty Association must assess its member companies and use those assessments to fulfill the contractual obligations of the insolvent insurer. The Guaranty Association acknowledges its statutory liability to at least 26 UNAC policyholders with regard to the increase in guaranteed premiums and the default on the Return of Premium Riders allowed by the Order of Rehabilitation. The anticipated liability of the Guaranty Association may exceed $100,000.

9. As a result of its liability under the Guaranty Act, the Guaranty Association entered into a Service Contract with UNAC dated October 13, 1977. Pursuant to that contract, the Guaranty Association agreed to pay the increased premiums that were allowed under the order of rehabilitation on policies with guaranteed premiums and also to pay any liability under the Return of Premium Riders. Paragraph 12 of the Service Contract reads, in part, as follows:

> It is expressly agreed, however, that the Guaranty Association and UNAC explicitly reserve all their rights and remedies in connection with any deposits made by UNAC with the Commissioner of Insurance of North Carolina, including deposits understood to total $100,000, which rights and remedies are governed by North Carolina law.

In a letter dated December 5, 1977, from David Phipps, President of UNAC, to Marion J. David, Chairman of the Guaranty Association, UNAC took the position that the abovequoted portion of Paragraph 12 of the Service Contract pertained only to whatever rights existed after the implementation of the plan and that no rights existed at that point.

10. Neither the deposit made by UNAC in North Carolina, nor the special legal rights of North Carolina policyholders in that deposit were specifically considered by the Indiana Court in the rehabilitation order dated November 22, 1976.

11. By complaint filed on January 12, 1978, the Guaranty Association commenced this declaratory judgment action in the Superior Court of Wake County, North Carolina, against UNAC, the Insurance Commissioner and the Treasurer of the State of North Carolina. In this action, the Guaranty Association requests a judgment declaring the Guaranty Association's right to

have UNAC's deposit applied to meet UNAC's obligations to North Carolina policyholders and excluding UNAC from any interest in the deposit except as to any interest that might remain after the deposit is applied to payment of the contractual obligations of UNAC to residents of North Carolina.

12. The answer of the Commissioner of Insurance and the Treasurer in this action admitted the pertinent allegations contained in the complaint filed by the Guaranty Association. Additionally, the Commissioner of Insurance and Treasurer filed a crossclaim and counterclaim requesting that the Court enter a judgment declaring their powers, rights, duties and responsibilities with respect to the deposit made by UNAC. The crossclaim and counterclaim also requested that, should this Court find that the deposit should be liquidated for the benefit of the Plaintiff and North Carolina policyholders, that the Commissioner of Insurance be appointed liquidator.

13. On July 13, 1978, UNAC filed a Petition for Instructions in the Superior Court of Marion County, Indiana. The Petition for Instructions asserted that the Guaranty Association was in breach of the Service Contract and in violation of the Court's final order, the plan of rehabilitation and other orders of the Court in filing the declaratory judgment action in North Carolina. The Petition for Instructions asked whether, in light of the alleged breach of contract and violation of the Court's orders, UNAC should be required to pay the money owed by it under the Service Contract to the Guaranty Association.

14. By order dated November 22, 1978, the Indiana Superior Court in Marion County held, as a conclusion of law, that the order of rehabilitation dated November 22, 1976, adjudicated and dismissed all claims, including the statutory rights of North Carolina policyholders in the special deposit made by UNAC with the Commissioner of

Insurance. The conclusions of law in that order also stated that the above-quoted portion of Paragraph 12 of the Service Contract was invalid and that the declaratory judgment action brought in North Carolina was in violation of orders of the rehabilitation court. The November 22, 1978, order directed UNAC to withhold the payment of any monies due under the Service Contract in North Carolina until after resolution of the North Carolina suit and to take appropriate action to defend the suit in North Carolina. The Indiana Court's November 22, 1978, order has been appealed to the Indiana Court of Appeals.

CONCLUSIONS OF LAW

1. Under Article 17A and Article 20, Chapter 58, General Statutes of North Carolina, §§ G.S. 58-155.14, 58-155.15, 58-184, and 58-185 and under the applicable case law, only this Court has the requisite subject matter jurisdiction to determine the rights of North Carolina policyholders in the special deposits made by UNAC for their protection.

2. The Indiana insolvency proceeding involving UNAC lacked the necessary in personam jurisdiction over the Commissioner of Insurance and the Treasurer of the State of North Carolina to adjudicate the rights in the deposit made by UNAC in North Carolina. The Indiana insolvency proceeding also lacked the necessary in personam jurisdiction over North Carolina policyholders of UNAC since neither a North Carolina policyholder nor a similarly situated policyholder appeared before the Indiana Court.

3. An appearance in the Indiana insolvency proceeding by any of the parties having an interest in the deposit made by UNAC in North Carolina could not constitute a waiver of the Indiana Court's lack of subject matter jurisdiction with regard to the deposit.

4. The Indiana Court's determination that the North Carolina deposit was an asset included in the Indiana insolvency proceeding and that any claim against the

deposit was dismissed by the Indiana Court's final order and the plan of rehabilitation is contrary to the applicable law regarding rights in deposits made by foreign insolvent insurance companies as established under Article 17A and Article 20 of the General Statutes of North Carolina and the court decisions pertaining to such deposits.

5. The Indiana Court's abrogation of the statutory rights in special deposits of North Carolina policyholders is in violation of the Full Faith and Credit provision of the United States Constitution.

6. Because the Indiana Court lacked the requisite subject matter jurisdiction and in personam jurisdiction to determine the rights of North Carolina policyholders in the deposit made by UNAC in North Carolina, the Indiana Court's decision is not entitled to Full Faith and Credit in North Carolina and is not protected by the legal doctrine of *res judicata.*

7. The Guaranty Association has stated a claim upon which relief can be granted under the Declaratory Judgment Act, G.S. §§ 1-253, *et seq.*, and under the Guaranty Act, G.S. § 58-155.72(8).

8. The statute of limitations does not bar the rights of North Carolina policyholders of UNAC and the Guaranty Association to have the deposit made by UNAC liquidated and used to meet the pre-rehabilitation obligations owed by UNAC.

9. The North Carolina policyholders of UNAC and the Guaranty Association are entitled to have the deposit made for the protection of North Carolina policyholders by UNAC liquidated and used to meet the pre-rehabilitation obligations owed by UNAC.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The UNAC policyholders residing in North Carolina on August 5, 1974, are entitled to have the deposit made by UNAC for the sole protection of North Carolina policyholders liquidated and to have the proceeds applied to meet the pre-rehabilitation obligations owed to them by UNAC to the extent those obligations were defaulted upon as a result of the insolvency of UNAC and the subsequent rehabilitation proceeding in Indiana.

2. To the extent that the proceeds of the deposit made by UNAC for the sole benefit of North Carolina policyholders fulfill the contractual obligations owed by UNAC to North Carolina policyholders, the Guaranty Association is not liable to North Carolina UNAC policyholders under the Guaranty Act.

3. UNAC has no interest in the deposit made by it in North Carolina for the sole benefit of North Carolina policyholders except in such sums as remain after the sale of the deposited securities and application of the proceeds for payment of all pre-insolvency obligations owed by UNAC to policyholders residing in North Carolina on August 5, 1974.

4. This Court shall retain jurisdiction in order to grant such further, supplemental relief based on the declaratory judgment herein rendered, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Guaranty Association.

5. The Commissioner of Insurance shall promptly proceed to liquidate the deposit made by UNAC for the benefit of North Carolina policyholders and apply the proceeds to meet the pre-rehabilitation obligations owed by UNAC to North Carolina policyholders.

6. The counterclaim of UNAC against the Guaranty Association requesting damages incurred by reason of frivolous and improper acts of the Guaranty Association in commencing this action is hereby dismissed.

This *11th* day of *April*, 1979.

s/ James H. Pou Bailey

James H. Pou Bailey
Judge Presiding

APPENDIX D

STATE OF INDIANA)		IN THE SUPERIOR
)	SS:	COURT OF MARION
COUNTY OF MARION)		COUNTY
		ROOM NO. 5
DEPARTMENT OF INSURANCE,)		
STATE OF INDIANA,)		
)		
Petitioner,)		
)		
v.)		CAUSE NO.
)		S574-851
UNDERWRITERS NATIONAL)		
ASSURANCE COMPANY,)		
)		
Respondent.)		

ORDER

On July 13, 1978, Underwriters National Assurance Company ("Underwriters") filed a Petition for Instructions with the Court ("Petition"). Part III of the Petition deals with the impact of the lawsuit filed against Underwriters by the North Carolina Life and Accident and Health Insurance Guaranty Association ("North Carolina Association") upon the obligations of Underwriters and of the North Carolina Association under the Court-approved Service Contract between Underwriters and the North Carolina Association and under the orders of the Court. Underwriters asked the Court, pursuant to paragraph (10) of the Court's final Order, dated November 22, 1976, to determine whether or not Underwriters should pay monies under the Service Contract to the North Carolina Association and, in accordance with that determination, direct appropriate action by Underwriters in accordance with the Court's final Order and the Plan of Rehabilitation ("Plan"), and the other orders of the Court.

Pursuant to an Order Setting Hearing, dated August 30, 1978, the Court on September 20, 1978, received a Stipulation of Fact and heard oral argument by Indianapolis counsel for Underwriters and by Indianapolis and North Carolina counsel for the North Carolina Association on Part III of the Petition. The Court has also received briefs from the North Carolina Association and from Underwriters. No other party appeared at the hearing and no other party has presented any matter to the Court concerning Part III of the Petition.

Having considered the matters set out in the Petition, the evidence and arguments presented by the parties, and the record herein, the Court makes the following Findings of Fact and Conclusions of Law and issues the following Order:

FINDINGS OF FACT

1. The North Carolina Association has been a named party to this rehabilitation proceeding since June 8, 1976, when it filed a Motion to Intervene. It has been represented by counsel herein.

2. Part X (C) of the Plan, as adopted by the final Order of the Court, says:

> "On August 4, 1974, UNAC was licensed to do business in states which either had at that time or have subsequently enacted legislation providing for some form of life and/or health insurance guaranty association. While the legislation in each state differs particularly as to its applicability, the general purpose of such legislation is to protect the state's policyowners, subject to certain limitations, against failure in performance of contractual obligations due to the impairment of the insurer. To provide that protection, an association of insurers is created to ensure the payment of policy benefits and of

continuation of coverages, and members of the association are subject to assessment to provide funds to carry out that purpose.

"The Rehabilitator understands that the guaranty associations in the eight states of Connecticut, Kansas, Montana, Nevada, New Hampshire, North Carolina, South Carolina and Vermont may have certain obligations to UNAC policyowners residing in their respective states on August 5, 1974. To the extent that any guaranty association, as a result of the rehabilitation proceeding, makes a payment to or on behalf of a UNAC policyowner, that policyowner's rights under the UNAC policy shall be deemed to be assigned to the guaranty association until such time as the guaranty association has been fully reimbursed. UNAC shall have no further obligation or liability to any guaranty association, other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however,* if any guaranty association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing provisions, that association shall receive from UNAC each year until fully reimbursed a portion of UNAC's statutory net gain from operations after dividends to policyowners, federal income taxes and the payments to be made under Part XI, equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for UNAC basic coverage on August 5, 1974."

Paragraph (3) of the final Order says:

> "To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims or litigation by any past or present UNAC policyowners, UNAC International Corporation, UNAC agents, brokers or managers, UNAC officers and directors, UNAC creditors, and shareholders of UNAC International Corporation against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed."

3. By the Court's Order of June 14, 1977, Underwriters and each of the guaranty associations were authorized and directed to execute a Service Contract in substantially the form attached to a joint petition filed by Underwriters and the guaranty associations on June 8, 1977, and to do all acts reasonably necessary or appropriate to implement and carry out the Service Contract. Underwriters states in the Petition that it has executed identical Service Contracts (in a form identical to that attached to the joint petition) with the guaranty associations in Connecticut, Kansas, Nevada, New Hampshire, and South Carolina and has tendered for execution identical Service Contracts with the guaranty associations in Montana and Vermont.

4. A copy of the Service Contract between Underwriters and the North Carolina Association was attached to the Petition as Exhibit A and is in evidence as Stipulation Exhibit A. That Service Contract is identical to all other Service Contracts between Underwriters and the guaranty associations, with the exception of the insertion

by the North Carolina Association of the last paragraph of the Service Contract on page 8. That insertion was not authorized by the Court, either when the form Service Contract was approved in the Order of June 14, 1977, or any other time.

5. When delivering to the North Carolina Association by mail the executed Service Contract, with the inserted paragraph, Underwriters advised the North Carolina Association by letter dated December 5, 1977, that it was Underwriters' understanding that the inserted paragraph on the last page was designed simply to recite that neither Underwriters nor the North Carolina Association was waiving any claims that it may have in connection with North Carolina deposits and that it was Underwriters' position that the North Carolina Association had no claim to the deposits because of the contrary provisions of the Plan. Underwriters asked the North Carolina Association to advise Underwriters if the North Carolina Association had any different view. Underwriters also advised the North Carolina Association in that letter that it was Underwriters' understanding that the last paragraph was inserted by the North Carolina Association simply to preserve whatever rights it may have had after implementation of the Plan and that Underwriters was executing the Service Contract with that understanding. The December 5, 1977, letter from Underwriters to the North Carolina Association is in evidence as Stipulation Exhibit F. While there is no direct evidence in the record as to when the Service Contract, as changed by the North Carolina Association, was signed by the respective parties, the reasonable inferences to be drawn from the exhibits in the record indicate that the North Carolina Association signed on or about October 13, 1977 (the typed date appearing on the first page of the Service Contract), but that Underwriters did not sign until on or shortly before December 5, 1977.

6. On January 12, 1978, the North Carolina Association sued Underwriters in a North Carolina state court seeking to obtain the benefit of deposits made by Underwriters in 1973 in North Carolina totalling $100,000 ("North Carolina deposit"). Letters to and from Underwriters and the Department of Insurance of the State of North Carolina in 1973 are in evidence as Stipulation Exhibits G, H and I. Underwriters has defended the lawsuit by answering the North Carolina Association's complaint and filing a counterclaim against the North Carolina Association. A copy of Underwriters' answer and counterclaim was attached to the Petition as Exhibit C and is in evidence as Stipulation Exhibit C. The Commissioner of Insurance and the Treasurer of the State of North Carolina, co-defendants in the lawsuit, have filed a cross-claim against Underwriters, a copy of which was attached to the Petition as Exhibit D and is in evidence as Stipulation Exhibit D. Underwriters has filed an answer thereto, a copy of which was attached to the Petition as Exhibit E and is in evidence as Stipulation Exhibit E.

7. Neither prior to the issuance on November 22, 1976, of the Court's final Order adopting the Plan, nor even prior to the Court's orders of April 20, 1977, and June 14, 1977, concerning the Service Contract, did the North Carolina Association make any claim to (or state any objection to any orders of the Court based upon) the North Carolina deposit. Part V of the Plan, which was distributed to all policyowners and other interested persons, included the North Carolina deposit in the general assets of Underwriters for the purpose of rehabilitating Underwriters for the benefit of all policyowners everywhere. The North Carolina Association raised no objection to the inclusion of the North Carolina deposit as a general asset of Underwriters and made no contention that these assets in any manner constituted a separate fund for its benefit, or for the benefit of the policyowners in North Carolina.

8. Underwriters states in the Petition that it is ready to mail to the North Carolina Association, pursuant to the terms of the Service Contract, certain monies which the Service Contract provides are to be remitted quarterly. Were it not for the North Carolina Association's filing of a lawsuit against Underwriters asserting a claim to the North Carolina deposit, Underwriters states in the Petition that certain monies will be remitted to the North Carolina Association. However, Underwriters contends it should not remit monies to the North Carolina Association if, as Underwriters contends, the Association's filing of the lawsuit constitutes a breach of the Service Contract or a violation of the Court's final Order, the Plan, or other orders of this Court. Underwriters has been forced to employ attorneys in North Carolina and has incurred other additional legal expense as a result of the North Carolina Association's actions. Underwriters should withhold funds from the North Carolina Association to compensate it for these expenses, pending final resolution of the North Carolina lawsuit.

9. Since the adoption of the Plan, Underwriters has complied with the terms of its policies as modified by the Plan, and has not defaulted in any obligation to any North Carolina policyowners.

10. On July 13, 1978, Underwriters mailed a copy of the Petition to each of the attorneys listed on the Schedule of Attorneys for Service of Papers, a copy of which was attached to the Petition as Exhibit F, and to the Indiana Department of Insurance. Underwriters also mailed copies to the North Carolina attorneys for the North Carolina Association and for the Commissioner of Insurance and the Treasurer of the State of North Carolina. The Court's Order Setting Hearing, dated August 30, 1978, was mailed to the same persons. Said mailings constitute reasonably adequate notice to interested parties of the contents of the Petition and of the hearing on September 20, 1978.

CONCLUSIONS OF LAW

1. The Court includes in its Conclusions of Law any finding of fact above which is a conclusion of law.

2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. Any attempt by the North Carolina Association or any other person to circumvent the provisions of the final Order, the Plan, or other orders of the Court, or to obtain any preference or special right in the assets of Underwriters, as fully adjudicated by the final Order and the Plan, is a violation of the orders of this Court to be dealt with by the Court.

4. The claims asserted in the North Carolina lawsuit commenced by the North Carolina Association against Underwriters would result in a violation of the orders of this Court. While the Court, pursuant to Ind. Code §§ 27-1-4-2 and 27-1-4-9 and the continuing jurisdiction retained by the Court pursuant to the final Order and the Plan, may have the power to enjoin the North Carolina Assocation from proceeding in the North Carolina state court against Underwriters on issues determined in the rehabilitation proceeding (to which both Underwriters and the North Carolina Association were parties), the Court has no reason to believe that the North Carolina state court will not, as a matter of comity and full faith and credit, recognize as binding the prior determinations of this Court. Underwriters has not applied for injunctive relief and an injunction will not be issued against the North Carolina Association at this time.

APPENDIX E

ORDER

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. Underwriters shall withhold the payment of any monies under the Service Contract to the North Carolina Association until further order of the Court after a resolution of the lawsuit filed by the North Carolina Association and a report to the Court as to said resolution by Underwriters and the North Carolina Association.

2. Underwriters is directed to take all appropriate action to resist application of the North Carolina deposit to reimburse the North Carolina Association or any North Carolina policyowners for claims that were compromised and settled by the Plan. Claims arising from defaults by Underwriters in its obligation to North Carolina policyowners under policies as revised pursuant to the Plan, are not affected by this Order.

3. The Court reserves judgment on any questions concerning possible additional action that should be taken concerning the provisions of the Service Contract, pending further discussions between Underwriters and the North Carolina Association, and a petition for instructions by Underwriters or the North Carolina Association if either believes said additional action should be considered by the Court.

Dated: 11-22-78

s/ Michael T. Dugan, II

Judge, Superior Court of Marion County, Room No. 5

Copies to:
All Counsel of Record
Indiana Department of Insurance
Arch T. Allen, III
Rufus L. Edmiston
Isham B. Hudson, Jr.

STATE STATUTES INVOLVED

Indiana Insurance Law

Ind. Code § 27-1-4-1:

Rehabilitation of domestic companies—Grounds. In addition to any and all other powers conferred by this act [27-1-2-1—27-1-2-32], the department is hereby authorized, under judicial order as hereinafter provided, to take possession of the business and property of any domestic insurance company to which this act is applicable, for the purpose of rehabilitation, upon any one or more of the following grounds: That such insurer,

(a) is insolvent or in imminent danger of insolvency; or

(b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the department; or

(c) has neglected or refused to observe an order of the department to make good any deficiency, whenever its capital, if it be a stock corporation, or its surplus fund, if it be a mutual corporation, shall have become impaired; or

(d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other insurance company, without having first obtained the written approval of the department; or

(e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or

(f) has wilfully violated its charter or any law of the state; or

(g) has an officer who has refused to be examined under oath, touching its affairs; or

(h) has ceased to transact the business of insurance for a period of one [1] year; or

(i) has commenced or attempts to commence or prosecute any action or proceeding to procure the appointment of a receiver, custodian or sequestrator under any law except this article [27-1-4-1—27-1-4-30]; or

(j) has been the subject of an application for the appointment of a receiver, custodian or sequestrator of the insurance company or its property, or if a receiver, custodian or sequestrator, is appointed by a federal court or such appointment is imminent; or

(k) has consented to such an application through a majority of its directors, stockholders or members; or

(l) has not organized and obtained a certificate authorizing it to commence the transaction of its business within one [1] year from the date of its incorporation as provided for in section 77 [27-1-6-18] of this act [Acts 1935, ch. 162, § 29, p. 588.]

Ind. Code § 27-1-4-2:

Order of rehabilitation—Termination. (a) An order to rehabilitate a domestic insurance company shall direct the department to take possession of the property of such insurance company and to conduct the business thereof and/or to take such steps toward the removal of the causes and conditions which have made such proceeding necessary as the court shall direct.

(b) At any time the department shall deem that further efforts to rehabilitate such insurance company would be futile, it may apply to the court under this article [27-1-4-1—27-1-4-30] for an order of liquidation.

(c) The department, or any interested person, upon due notice to the department, at any time, may apply for an order terminating this proceeding and permitting such

insurance company to resume possession of its property and the conduct of its business, but, no such order shall be granted except when, after a full hearing, the court shall determine that the purposes of the rehabilitation proceeding have been accomplished. [Acts 1935, ch. 162, § 30, p. 588.]

Ind. Code § 27-1-4-9:

Injunctions.— (a) Upon an application by the department for an order to show cause under this article [27-1-4-1—27-1-4-30], or at any time thereafter, the court before whom such order is returnable may issue an injunction restraining the insurance company named in the order, its officers, directors, stockholders, members, trustees, agents, servants, employees and/or all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(b) Such court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the department or the proceeding, or waste of the assets of the insurance company, or the prosecution of any actions, or the obtaining of any preferences, judgments, attachments or other liens, or the making of any levy against the insurance company or against the assets or any part thereof. [Acts 1935, ch. 162, § 37, p. 588.]

Ind. Code § 27-1-4-10:

Right to liquidate.—Except as herein otherwise provided, the sole and exclusive right to terminate and liquidate the affairs of any insurance company to which this act [27-1-2-1—27-1-20-32] is applicable, shall be vested in the department, and hereafter no receiver, assignee, trustee or liquidating agent shall be appointed for such purpose or for any insurance company or the assets or

property thereof by any court, or the judge thereof or any other person. After the department shall have taken possession of the business and property of any insurance company, as herein provided, no suit, action or other proceeding at law or in equity shall be commenced or proceeding had against such insurance company upon any debt, obligation, claim or demand, but all debts, claims and demands of every kind and character against such insurance company shall be filed with the department and shall be determined and disposed of as provided in this act. No person, firm or corporation holding any of the property or claims of any such insurance company shall have any lien or charge against such property or credits for any payment, advance or clearance made after receiving notice of the fact that the department has taken possession and no lien shall attach to any of the assets or property of such insurance company by reason of the entry of any judgment recovered against such insurance company after the department shall have taken possession of its business and property and while such possession continues. [Acts 1935, ch. 162, § 38, p. 588.]

North Carolina Insurance Law

N.C. Gen. Stat. § *58-155.69(6):*

Definitions.—As used in this Article:

* * *

(6) "Impaired insurer" means (i) an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction, or (ii) an insurer deemed by the Commissioner after the effective date of this Article to be unable or potentially unable to fulfill its contractual obligations.

No. 80-1496

Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,
Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 3, 1981.
CERTIORARI GRANTED MAY 18, 1981.
Central Publishing Company, Inc., Indianapolis, IN 46206

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10. Notices to Interested Parties in the Proceeding before the Indiana Rehabilitation Court, mailed in December, 1976, and January, 1977, Exhibit 11 to the Affidavit of Charles T. Richardson	30, Ex. Binder 250	83
11. Petition for Instructions Concerning A Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations, filed by NCGA, UNAC and others in the Indiana Rehabilitation Court on June 8, 1977, Exhibit 13 to the Affidavit of Charles T. Richardson.	30, Ex. Binder 272	89
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[The following items appear only in the Appendices to UNAC's Petition for a Writ of Certiorari.]		
17. Order of the Indiana Rehabilitation Court, issued November 22, 1978	Pet. App. 31A-41A	
18. Order of the North Carolina Trial Court, issued April 11, 1979	Pet. App. 19A-28A	
19. Opinion of the North Carolina Court of Appeals, issued September 2, 1980	Pet. App. 5A-16A	
20. Judgment of the Supreme Court of North Carolina, issued December 4, 1980	Pet. App. 1A-2A	

1.

Docket Entries In The North Carolina Courts Below

The following are the docket entries as they appear in the records of the North Carolina courts below.

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE	
WAKE COUNTY	SUPERIOR COURT DIVISION	
NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION,	)	
Plaintiff,	)	
v.	)	No. 78CVS174
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,	)	
Defendants.	)	

[The original docket entries are in two columns entitled "Document Filed by PLAINTIFF" and "Document Filed by DEFENDANT." Entries in the original docket appear in chronological order within each column, rather than in the integrated chronological order displayed below.]

DATE	ITEM	COLUMN
1/12/78	Complaint	Plaintiff
2/13/78	Order of Service issued sheriff Wake served on Underwriters Nat. Assurance Co. served 2-13-78	Plaintiff
2/13/78	Order extending time to answer Complaint to & including 3-14-78	Plaintiff
2/13/78	Answer, Counterclaim & cross claim w/ cert. of Serv. against Underwriters Nat'l Assurance Co.	Defendant
3/14/78	Answer of National Assurance Co. w/ cert. of serv.	Defendant
3/14/78	Answer to Cross-Claim w/ cert. of Serv.	Defendant
4/14/78	Reply w/ cert. of Serv.	Plaintiff
1/30/79	Notice and Joint Motion for summary judgment w/ cert. of serv.	Plaintiff
1/30/79	Affidavit of Bobby W. Gray	Plaintiff
1/31/79	Notice w/ cert. of serv.	Plaintiff
3/12/79	Motion for Summary Judgment and Notice of hearing w/ cert. of serv.	Defendant
3/12/79	Affidavit of Charles T. Richardson w/ exhibits (see vault)	Defendant
3/14/79	Affidavit of David P. Phipps w/ cert. of serv.	Defendant
3/20/79	Courtroom Procedure	Plaintiff
4/2/79	Affidavit of William S. Patterson	Plaintiff
4/11/79	Order and dismissal of Underwriters counterclaim [The order of the North Carolina trial court	Plaintiff

	issued on April 11, 1979 appears at Pet. App. 19A-28A.]	
4/20/79	Notice of Appeal to Ct of Appeals by Deft Underwriters (UNAC) Nat'l w/ cert. of service	Defendant
4/20/79	Application for Enforcement of Judgment pending appeal	Defendant
4/23/79	Appeal Entries	Defendant
5/14/79	Stay of Enforcement of Judgment	Plaintiff
7/5/79	2nd proposed record on appeal	Defendant
7/13/79	Consent order extending time to settle record on appeal	Defendant
7/30/79	Stipulation	Defendant
8/2/79	Record on appeal (Exhibits to record on appeal in vault)	Plaintiff
9/24/80	Judgment & Opinion from the NC Court of Appeals; no error [The opinion of the North Carolina Court of Appeals issued on September 2, 1980, appears at Pet. App. 5A-16A.]	Defendant
10/6/80	Cert. of Satisfaction of Costs in Court of Appeals	Defendant
10/20/80	Notice that case has been certified to the Supreme Court	Defendant
12/8/80	Notice from Ct of Appeals; Supreme Court denied Petition for Review [The judgment of the Supreme Court of North Carolina issued on December 4, 1980, appears at Pet. App. 1A-2A.]	Defendant
5/28/81	Notice from Ct of Appeals; U.S. Supreme Court allow Certiorari	Defendant

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION,	)	
v.	)	No. 7910SC766
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA.	)	

[The following entries are reproduced verbatim as they appear in the records of the court.]

Filed	8-22-79
Docketed	8-22-79
Argued	2-29-80
Opinion	9/2/80

[The opinion of the North Carolina Court of Appeals issued on September 2, 1980, appears at Pet. App. 5A-16A.]

Certification	9/22/80	
Satisfaction	10-2-80	
Appealed (Certiorari) (D.R.)		10-10-80
Certified to Supreme Court		10-16-80
Judgment & D.R. denied	Appeal dismissed 12-2-80	

[The judgment of the Supreme Court of North Carolina issued on December 4, 1980, appears at Pet. App. 1A-2A.]

Allowed by U.S. Supreme Court 5-18-81

* * *

Docket Fee	8-22-79
Record	8-22-79
Appellant's Brief	10-22-79
Appellee's Brief	12-3-79
Addendum (R) (B)	12-3-79
Other Briefs DRB	12-17-79
Exhibits	8-22-79

* * *

Motion Of	Date		Ruling	Date
Appellant	8-22-79	Motion	Allowed	8-23-79
Appellant	9-20-79	Motion		
Appellee	11-6-79	Motion	Allowed	11-7-79
Appellee	11-8-79	Motion	Allowed	11-8-79
Appellant	2-14-80	Motion Richardson	Allowed	2-15-80
Appellant	2-14-80	Motion Boehm	Allowed	2-19-80

* * *

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1980

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION,	)	
v.	)	No. 60PC
UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA.	)	

[The following entries are reproduced verbatim as they appear in the records of the court.]

Docketed 6 October 1980
Notice of Appeal
10-15-80—Motion to Dismiss
12-2-80—Appeal Dismissed
Pet. for Discretionary Review
Under GS7A-31 10-15-80—Answer
10-15-80—Answer (AD)
12-2-80—Denied
[The judgment of the Supreme Court of North Carolina issued on December 4, 1980, appears at Pet. App. 1A-2A.]

2.

[Exhibit In The North Carolina Court of Justice, Superior Court Division, Wake County]

DEPARTMENT OF INSURANCE

State of North Carolina

P. O. Box 20307

RALEIGH, N. C. 27611

June 13, 1973

JOHN RANDOLPH INGRAM (919) 829-7343
COMMISSIONER OF INSURANCE

Mr. Ralph K. Lindop, President &
Chairman of the Board
Underwriters National Assurance Company
3637 North Meridian Street
Indianapolis, Indiana 46208

Re: Review of Operations and Financial Condition of Underwriters National Assurance Company

Dear Mr. Lindop:

This will confirm my telephone conversation with you of June 13, 1973 relative to the operations and financial condition of Underwriters National Assurance Company for the calendar year ending December 31, 1972.

As indicated to you by telephone, Commissioner Ingram has requested that you deposit for the sole benefit of North Carolina policyholders $100,000 in eligible securities in order that this Department may be in a position to issue the Company's license for the year July 1, 1973 through June 30, 1974.

As further indicated to you by telephone, please furnish this Department a letter setting forth corrective measures

which the Board of Directors and Officers of your Company are now taking to reduce the continuing drain on suprlus during 1973.

If you have not already done so, it is requested that the Company advise this Department as promptly as possible of its compliance with the above request. The Company should contact this Office within the next ten (10) days relative to eligible securities and the appropriate registration thereof prior to the submission of any securities.

Sincerely yours,

JOHN RANDOLPH INGRAM
Commissioner of Insurance

/s/ George E. King
Deputy Commissioner & Chief Examiner
Company Operations Division

3.

[Exhibit In The North Carolina Court of Justice, Superior Court Division, Wake County]

underwriters national assurance company
CORPORATE OFFICES: 3637 N. MERIDIAN ST., INDIANAPOLIS, INDIANA 46208

June 18, 1973

Mr. George E. King
Deputy Commissioner & Chief Examiner
Company Operations Division
North Carolina Department of Insurance
P. O. Box 26387
Raleigh, North Carolina 27611

Dear Mr. King:

Pursuant to your letter to me of June 1973 and our previous telephone conversation, I have asked our Treasurer, Mr. Bruce Bowers, to contact Mr. Bryant Tyndall of your Department regarding arrangements for transferring $100,000 deposit to your Department for the sole benefit of North Carolina policyholders. You, of course, indicated that this was a requirement for our license to be renewed for July 1, 1973.

We are well aware that there has been some drain of our surplus over the past 12 years of our company's existence. As you know, this is a natural phenomenon of any conventional life and health insurance company. I believe we have a fine company, and I am proud of our accomplishments in light of the limited surplus which we have used in attaining the position of being the second largest producer of non-cancellable accident and sickness loss-of-time insurance in the country. The information available which leads me to make such a statement is not complete, but I still believe the statement is accurate.

You will be happy to know that we have taken considerable steps to improve our statutory surplus situation. Primarily, we have committed ourselves to the opening of only one new agency in 1973. New agencies in 1974 will be similarly limited. (In the three years prior to 1973, we had opened a total of 25 new agencies.) Also we are engaged in an austerity program in which we are determined to "hold the line" on Home Office expenses. The first quarter's figures for this year gave us the first indication of our progress on this program, inasmuch as general expenses in the first quarter of 1973 were only 4% higher than general expenses in the first quarter of 1972, while income was up 60%. This was accomplished in light of the fact that salaries, one of our largest expense items, were up 5½% to 6% and in spite of the fact that we had installed new computer equipment in the latter part of 1972. We are confident that as a result of these programs there will be an improvement in our surplus position which now stands at over $3,000,000.

Sincerely,

/s/ Ralph K. Lindop
Chairman of the Board
President

RKL:kjw

4.

[Exhibit In The North Carolina Court of Justice, Superior Court Division, Wake County]

underwriters national assurance company
CORPORATE OFFICES: 3637 N. MERIDIAN ST., INDIANAPOLIS, INDIANA 46208

June 19, 1973

Mr. George E. King
Deputy Commissioner & Chief Examiner
Company Operations Division
North Carolina Department of Insurance
P. O. Box 26387
Raleigh, North Carolina 27611

Re: Deposit with North Carolina Insurance Department

Dear Mr. King:

In accordance with your request concerning renewal of license for Underwriters National Assurance Company and in accordance with my phone coversation with Mr. Bob Gray on June 19, UNAC has instructed its Custodial Bank to re-register and transfer the securities shown on the attached letter to the North Carolina Department of Insurance.

We understand that interest payments will be sent to the Treasurer of the State of North Carolina, with the checks made payable to the Treasurer of North Carolina and Underwriters National Assurance Company. We further understand that the Treasurer of the State of North Carolina will endorse the interest checks and remit them on a timely basis to Underwriters National Assurance Company.

Our auditors, Ernst & Ernst, each year confirm all securities owned by UNAC, and we understand that the auditors' confirmations are to be sent directly to you.

We believe all matters regarding this deposit have been covered. If, however, additional information is needed, we would appreciate hearing from you.

Sincerely,

/s/ Bruce B. Bowers
Vice President and
Treasurer

BBB/cs
cnc

5.

STATE OF INDIANA)		IN THE SUPERIOR COURT
) SS:		OF MARION COUNTY,
COUNTY OF MARION)		ROOM NO. 5

DEPARTMENT OF INSURANCE, STATE OF INDIANA,	)	
Petitioner,	)	
	)	CAUSE NO.
vs.	)	S574 851
UNDERWRITERS NATIONAL ASSURANCE COMPANY,	)	FILED August 5, 1974
Respondent.	)	

ORDER OF REHABILITATION

Comes now Petitioner, Department of Insurance of the State of Indiana, by Theodore L. Sendak as Attorney General of Indiana and files their Verified Application for Rehabilitation and Petition for Order to Show Cause in the following words and figures to wit:

(H.I.)

And appears Respondent by counsel and waives notice and waives hearing on Order to Show Cause and this proceeding being submitted to the Court on said Verified Application for Rehabilitation and Petition for Order to Show Cause and the Court being duly advised in the premises, now finds that the Department of Insurance of the State of Indiana should, by the appointment of LLOYD M. ALLEN, Commissioner of Insurance of the Department of Insurance of the State of Indiana as Rehabilitator, take possession of the business and assets of Underwriters National Assurance Company and conduct the business thereof and appoint such personnel as may be necessary to

rehabilitate Underwriters National Assurance Company as permitted by IC 1971 27-1-4-2 found at Burns' (1965 Repl) Section 39-3402(a) subject to the provisions of Clauses (b) and (c) thereof and the further order of this Court.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED, by the Court that the Department of Insurance of the State of Indiana, by the appointment of Lloyd M. Allen, Commissioner of Insurance of the Department of Insurance of the State of Indiana as Rehabilitator take possession of the business and assets of Underwriters National Assurance Company and conduct thereof and appoint such personnel as may be necessary to rehabilitate Underwriters National Assurance Company.

/s/ Addison M. Dowling, Judge
Superior Court Room No. 5 of
Marion County

Dated: 8-5-74

6.

[In the Superior Court of Marion County, Indiana, Room No. 5]
[Title omitted in printing]

NOTICE TO POLICYHOLDERS

To: all persons who are or have at any time been holders of contracts of insurance with Underwriters National Assurance Company ("UNAC").

This notice is issued pursuant to Rule 23 of the Indiana Rules of Trial Procedure. If you are a member of the class of all policyholders who now hold or have held contracts of insurance with Underwriters National Assurance Company this notice may affect your legal rights. The Court has conditionally determined that the following named individuals represent the class: B. M. Honeycutt; T. J. Barconic; R. D. Fromme; J. E. Syman; T. E. Theiman; L. J. DeAngelis; J. F. Mannion; and Robert Schultz. Attorneys for the named policyholder representatives and the class of all policyholders are: Smith and Carponelli, 10 South LaSalle Street, Suite 444, Chicago, Illinois 60603 and Lewis, Wilson, Cowels, Lewis & Jones Ltd., 2054 North 14th Street, Arlington, Virginia 22216.

On August 5, 1974, UNAC was placed in rehabilitation by order of this Court and the Department of Insurance of the State of Indiana was appointed Rehabilitator. Since that date no new business has been written and no matured benefits under "Return of Premium Riders" have been paid, but other insurance benefits have been paid.

The named representatives of the policyholder class, all airline pilots who are holders of disability income policies, initially brought two independent class actions against UNAC. *Schultz v. UNAC* was filed on August 2, 1974, in the Circuit Court of Cook County, Chicago, Illinois, and was subsequently removed to the United States District Court

for the Northern District of Illinois. *Honeycutt, et al. v. UNAC* was filed on August 8, 1974, in the United States District Court for the Eastern District of Virginia. The complaints in those actions alleged that UNAC had misled the named policyholder representatives and other members of the class as to the overall economic conditions of the corporation and as to the extent these policies were actuarially sound. They further alleged that these misrepresentations were accomplished, among other means, by a vigorous advertising campaign and through letters to individual policyholders and that, as a result, the company was unjustly enriched. Both of these actions (along with other litigation based on the same or similar claims) have been stayed by order of the judge in the rehabilitation proceeding. The named class representatives thereafter filed petitions to intervene on behalf of themselves and the class in these rehabilitation proceedings. They have been conditionally determined to represent as intervenors, the class of all UNAC present and former policyholders.

Any judgment whether favorable or not which may be entered in this action will be binding upon each member of the intervening class who does not request exclusion pursuant to Rule 23(b)(3). Any class member who wishes to be excluded from the class may do so by filing with the Clerk of the Superior Court of Marion County, Room No. 5, Indianapolis, Indiana, a written request for exclusion which must be received by the Clerk on or before January 15, 1976. Any person so requesting exclusion will not participate in any recovery on behalf of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. As a policyholder, however, he may be bound by a judgment affecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding. Any policyholder, whether or not he requests exclusion, may as he desires,

enter an appearance through his own counsel. Each member of the class not requesting exclusion, whether or not he enters such an appearance will be bound by any judgment in this proceeding.

On September 22, 1975, a Status Report was filed with this Court including detailed financial and actuarial information developed by the Department of Insurance of the State of Indiana, as Rehabilitator of UNAC since August 4, 1974. The report is available for inspection in the files of this Court and copies may be obtained at a cost of $24.50 each from the Department of Insurance of the State of Indiana, Room 509, State Office Building, Indianapolis, Indiana 46204. In brief summary, it is the conclusion of the Rehabilitator that (a) UNAC's reserves for Return of Premium Rider (RPR) issued by UNAC were inadequate and (b) that UNAC's reserves as to disability income policies were also inadequate, apart from RPR aspects.

Pursuant to these rehabilitation proceedings two alternatives for the future of the company are available: (1) liquidation and distribution of the available assets; and (2) a reorganization and rehabilitation. It is the present hope of the Rehabilitator that the company can be reorganized and continue offering insurance to present policyholders and new policyholders in the future.

The Rehabilitator with the aid of independent actuaries and accountants, has developed a proposed plan of rehabilitation and has supplied it to policyholder class representatives and their attorneys, and to intervenors on behalf of a class of shareholders of UNAC International Corporation (UNAC's holding company) and their attorneys. The Rehabilitator hopes to secure the agreement of the representative parties to a plan and would then submit the plan to the Court for approval or disapproval with hopes to implement the plan with a minimum of delay and expense. However, there can be no assurance that this will be accomplished.

Effective September 30, 1975, the Rehabilitator has reserved all additional premiums charged for RPR benefits in a separate account and proposes to recommend to the Court that those additional premiums (but not the premiums for underlying coverage) be returned to the policyholders. The Rehabilitator also has under study the possibility and administrative feasibility of returning to RPR policyholders the additional premium charged for RPR benefits from August 5, 1974, to September 30, 1975. As of September 30, 1975, no commissions have been paid to agents as a result of RPR premiums. To the extent that any policyholder with an RPR on his policy wishes to discontinue paying the additional premium charged for RPR benefits, the Rehabilitator will not assert that the action prejudices in any way his right to underlying insurance benefits. It may, of course, reduce the total consideration to the policyholder on account of his RPR rights under any plan of rehabilitation ultimately approved by the Court.

It is the Rehabilitator's view that the principal goal of the rehabilitation process is to permit UNAC to become an ongoing, financially responsible insurer, in order to provide insurance benefits. To that end the Rehabilitator has concluded that (a) elimination of continued writing of Return of Premium Riders is necessary and that this company's liability for existing RPR benefits must be compromised at less than full face value, and (b) the benefits afforded under disability income policies in the past must be reduced or a premium for such benefits raised as to all persons except those who have already incurred claims.

The Rehabilitator and policyholder representatives have concluded that there may be valid claims for recovery of damages from UNAC's former management or advisers or others. Therefore, both the Rehabilitator and the policyholder representatives on behalf of the class of policyholders contemplate the institution of litigation to

assert whatever rights UNAC or the policyholders may have to receive damages for mismanagement, breach of contract, negligence or other rights of action. The proceeds of any recoveries would inure to the benefit of the policyholders and UNAC.

Negotiations with all representatives and parties concerned have been proceeding since August 4, 1974, and it is hoped that a final plan of reorganization will be arrived at in the near future. The details of a plan of rehabilitation will be made available to all policyholders and parties when filed with this Court.

On December 1, 1975, James A. Newpher, a policyholder of UNAC, filed a petition for intervention in the rehabilitation proceeding asserting that his interests are not represented by the named representatives of the policyholder class, stating that he does not desire to be represented by them, and requesting that an investigation be conducted of certain matters in the rehabilitation proceedings. The Department of Insurance of the State of Indiana, as Rehabilitator, has advised the Court that the matters raised in Mr. Newpher's petition have been discussed by the Rehabilitation with the policyholder class representatives and are under consideration. These include the treatment of RPR premiums described above and the method of advising the policyholders of the status of the rehabilitation. The Rehabilitator has also advised the Court that it has no objection to any investigation but does not believe the expense of additional independent consultants is warranted or should be borne by UNAC. The Department of Insurance, as Rehabilitator, takes the position that is has and will continue to administer the rehabilitation in the best interests of the policyholders. To that end the Department is attempting to restore the company to a condition in which it can operate successfully.

The entire Court file in this action is available for inspection by any class member or his or her counsel during

regular business hours in the Superior Court of Marion County, Room No. 5, Indianapolis, Indiana. Inquiries concerning this matter may also be directed to the above named attorneys for the policyholder class.

This notice should not be construed as an expression of the Court's opinion on the merits of any claims or of any defenses which may be raised in this action.

Michael T. Dugan, II
Judge, Marion County Superior
Court, Room No. 5

December 3, 1975

7.

[Notice In The Superior Court of Marion County, Indiana, Room No. 5]

STATE OF INDIANA SEAL INDIANAPOLIS 46204

THE DEPARTMENT OF INSURANCE
509 STATE OFFICE BUILDING

August 1976

To: Policyholders of Underwriters National Assurance Company

Previous notice to you advised that Underwriters National Assurance Company was placed in Rehabilitation on August 5, 1974, and the company has been under the jurisdiction of the Department of Insurance since that date.

The Department of Insurance submitted a Plan of Rehabilitation to the Court which has now been tentatively approved for distribution to UNAC policyholders and other interested persons, after an initial hearing on June 9, 1976, at which the policyowner class, among other parties, was represented by counsel. Along with the Plan we have included a data sheet which indicates exactly how the plan, as tentatively approved, would affect you individually.

The Court has set a hearing for October 14, 1976, at which time it will make a final decision on the plan to be implemented after it has heard any additional objections which are properly filed prior to September 14, 1976. The procedure for filing objections or intentions to be heard is spelled out in the enclosed "Notice of Hearing." I would encourage you to act promptly if you have suggestions which merit the Court's consideration.

No decision by you is necessary at this time as to which of the options in the Plan you desire. This decision will be yours to make subsequent to the October 14 court ruling. You will then be presented with the court-approved plan

and at that time be required to make your decision based on your individual desires.

H. P. Hudson
Commissioner

HPH: aw
Enclosures

[Title omitted in printing]

NOTICE OF HEARING

TO: All parties interested in Underwriters National Assurance Company ("UNAC"), including each UNAC policyowner, all managers, supervisors or agents of UNAC, all state insurance guaranty associations, all state insurance departments, any person who has appeared in this proceeding and any other creditor or party determined by UNAC or the Rehabilitator to have a claim or potential claim against UNAC

You are hereby notified that on October 14, 1976, at 9:00 A.M. in Room W-507, City-County Building, Indianapolis, Indiana, 46204, there will be a final hearing before Judge Michael T. Dugan II, Superior Court of Marion County, Indiana, Room No. 5, to consider proposed plans of rehabilitation for UNAC and settlement and compromise of all claims asserted on behalf of the class of policyowners of UNAC or the class of stockholders of UNAC International Corporation. Attached hereto is a copy of the Proposed Rehabilitation Plan for UNAC tentatively approved by the Rehabilitation Court on July 19, 1976, after an initial hearing at which parties, including representatives of certain classes described hereafter, presently represented by counsel or appearing on their own behalf had an opportunity to be heard.

At the final hearing, any interested parties may appear and be heard concerning the Proposed Rehabilitation Plan and settlement. Each person intending to object to the Proposed Rehabilitation Plan or to appear at the hearing must file a notice of such intention to object or to appear with the Court, at the above address, by September 14, 1976, together with a brief statement of any objections to the Proposed Rehabilitation Plan and any matters to be presented at the hearing. A copy of each paper filed must be served by mail on counsel for the Rehabilitator, Theodore R. Boehm, Baker & Daniels, 810 Fletcher Trust Building, Indianapolis, Indiana 46204.

For the possible effect of rehabilitation upon your rights, your attention is directed to the provisions of the Proposed Rehabilitation Plan enclosed. If your policy is a life insurance contract there is no change proposed in your coverage and no data sheet is enclosed. For all other policyowners, the enclosed data sheet constitutes a part of this notice and sets forth the specific amounts of any payments that would be due you under the Proposed Rehabilitation Plan and any changes that would be effected in your insurance benefits if the Proposed Rehabilitation Plan is approved after the final hearing without modification. The specific information on this data sheet regarding actual dollar amounts as related to your options under the Proposed Rehabilitation Plan is based on UNAC records as of the date of this notice. That information may vary substantially in any plan as ultimately approved. Changes may be required by Court modifications to the Proposed Rehabilitation Plan or by necessary adjustments to the underlying data. You are not now required to select any option. This data is for information only. This notice, with its enclosures, is meant only to advise you of the final hearing on the Proposed Rehabilitation Plan for UNAC and proposed settlement of class actions, and to advise you to the extent possible at this time, how the Proposed Rehabilitation Plan, if finally approved by the Court, would affect you as an interested party.

If you are a member of the policyowner or stockholder classes, you should know that class attorneys have been awarded preliminary attorneys' fees for legal services at the rate of $50.00 per hour for services rendered prior to May 27, 1976, in the aggregate amount of $40,800 for stockholder class counsel and $166,325 for policyowner class counsel, plus expenses. Said attorneys may petition for additional fees for services after May 27, 1976, upon approval of a final plan of rehabilitation.

The Proposed Rehabilitation Plan provides in part XIII that upon final approval of the Proposed Rehabilitation

Plan, all claims against UNAC by policyowners or others are compromised and dismissed and all persons are discharged from any liability for acts during the rehabilitation of UNAC.

By Order of the Court, dated July 19, 1976.

Date: _____

THE DEPARTMENT OF
INSURANCE OF THE
STATE OF INDIANA,
Rehabilitator of UNAC

8.

[In The Superior Court of Marion County, Indiana, Room No. 5]

[Title omitted in printing]

FILED OCTOBER 12, 1976

INFORMATION TO THE COURT AND PETITION FOR APPROVAL OF MAILING TO CERTAIN POLICYHOLDERS OF UNAC AND APPROVAL OF CONCEPT OF SERVICE CONTRACT BETWEEN GUARANTY ASSOCIATIONS AND UNAC

The eight state Guaranty Associations which are parties herein and represented by counsel of record may owe certain benefits to certain UNAC policyholders who qualify, depending upon the election such policyholder makes under the final Plan of Rehabilitation. In order to discharge their statutory obligations, the Guaranty Associations deem it necessary to inform the potential recipients of Guaranty Association benefits of their rights, in writing, and to do so contemporaneously with the mailings of the Rehabilitator to all policyholders concerning the election of options under any plan the Court finally approves. A copy of this correspondence which all eight Guaranty Associations herein have approved, and which they in turn submit to the Court, is attached hereto. The Guaranty Associations believe that this letter will clarify for certain policyholders that might be eligible for Guaranty Association benefits their rights with regard to the effect that any final Plan of Rehabilitation might have upon such rights.

The Guaranty Associations realize that by operation of the Plan of Rehabilitation there will be certain limitations against the rights of certain policyholders as they existed prior to such rehabilitation under contracts of insurance issued by UNAC, to-wit:

(1) Certain of such policyholders who have heretofore had noncancellable insurance policies which provide in

effect that there can be no increase of premium on their policy during the life of the policy, and said policies now have been changed by the Plan of Rehabilitation to guaranteed renewable policies in which there is a possibility and a probability that there will be an increase in premium.

(2) Certain of such policyholders are the owners of policies which have a return of premium rider which provides for the return of a certain portion of premium under conditions set out in said policies, and that all of said rights of continued effectiveness of any return of premium rider are terminated by the Plan of Rehabilitation; and both of said rights are guaranteed by the Guaranty Association under certain circumstances provided a policyholder qualifies. In order to meet their statutory obligations and guarantee such rights, the Guaranty Associations respectfully submit that it is for the best interests of the policyholders and in the interest of uniform handling and the avoidance of confusion in the servicing of certain policies existing between UNAC and its policyholders, that UNAC will continue as a rehabilitated company in the issuing and servicing of the basic coverage of policies heretofore issued by it with certain exceptions.

To this purpose, a service contract within the concept set out in the attached form, shall be entered into by both Guaranty Associations and UNAC with the approval by the Court as to its final form and terms.

WHEREFORE, the Guaranty Associations pray that the Court approve the proposed mailing to certain policyholders and further approve the concept of a service agreement between the individual Guaranty Associations and UNAC.

KIGHTLINGER YOUNG GRAY
& DE TRUDE,

by /s/ Donald L. Dawson
Attorneys for Guaranty Associations.

Fifth Draft of Letter to Policyholders
October 7, 1976

Dear *(Policyholder)*:

The Underwriters National Assurance Company (UNAC) Rehabilitation proceeding in the Superior Court of Marion County, Indiana is now concluded. The records of UNAC that have been made available to us indicate that you may be entitled to benefits from the _____ Guaranty Association, providing you qualify. In this regard, if you intend to claim benefits from this Guaranty Association, you must execute the enclosed "Affidavit Regarding Residency and Policy Information" and return same to this office. From the information contained therein it will be determined if you qualify for benefits. The Guaranty Association benefits, if any, that you may qualify for are as specified below.

A final plan for the rehabilitation of Underwriters National Assurance Company was approved by the Superior Court of Marion County, Indiana on _____. You were mailed a "Proposed Rehabilitation Plan for Underwriters National Assurance Company" in August of 1976. The options under the final plan are identical to those in such proposed plan.

You will, if you have not already, receive correspondence from the Department of Insurance of the State of Indiana instructing you how to make the required election under the final plan as approved by the Court. The option you elect under the plan can affect your right to benefit under the _____ (State Guaranty Association Act), provided you qualify for any such benefits in the first instance.

Irrespective of what option you elect under the plan approved by the Court, if you qualify for benefits, you will be entitled to receive from *(the particular state)* Guaranty

Association Return of Premium (RPR) benefits, provided the benefits matured under your policy between August 5, 1974 and (date that plan was approved by the Court).

If you choose to elect Option 1 under the plan and by so doing receive a liquidated cash value and terminate your policy, you will not be entitled to any benefits from any Guaranty Association.

If you hold a non-cancellable policy with Return of Premium rider and elect Option 2 and receive an "RPR" liquidated cash value and terminate the "PRP" rider but retain basic coverages, you may be entitled to benefits from the _____ Guaranty Association, but such benefits, if any, would be limited to the amount of any increased premium charge to you in the future for continued coverage on a guaranteed renewable basis.

If you hold a guaranteed renewable policy with Return of Premium rider and elect Option 2 and receive an "RPR" liquidated cash value and terminate the "RPR" rider but retain basic coverages, you will not be entitled to any benefits from any Guaranty Association.

If you do not choose to elect Option 1 or Option 2, or if you are not deemed to have elected Option 2 under the final plan, you have available to you a third alternative. To exercise this alternative, you must assign to the _____ Guaranty Association all your rights under the final rehabilitation plan. You may accomplish this by executing the enclosed "Assignment of Rights Under Rehabilitation Plan for Underwriters National Assurance Company" and returning same to this office along with the enclosed "Affidavit Regarding Residency and Policy Information." If you elect this alternative, provided you meet the residency requirements, the _____ Guaranty Association will guarantee the terms of your existing insurance policy. These guarantees, however, will be in lieu of any other cash payment, benefits, or rights that you might otherwise be entitled to under the plan of rehabilitation, by the election of Option 1 or Option 2.

If you elect the third alternative, you must do so by executing the enclosed Assignment and mailing it to the _____ Guaranty Association no later than midnight, the _____.

This letter is meant simply to inform you concerning the rehabilitation of UNAC as it might relate to your rights under the _____ Guaranty Association Act. You should not consider this letter in any way a recommendation to continue your policies with UNAC or any representation on the part of the Guaranty Association with respect to the solvency of UNAC or of its ability to continue to do business.

We welcome any inquiries, but to avoid any possible confusion in responding to same, all inquiries must be in writing and addressed to this Guaranty Association.

ROUGH DRAFT—UNAC CONTRACT WITH GUARANTY ASSOCIATIONS

SERVICE CONTRACT

THIS AGREEMENT entered into this ____ day of _____, 1976, by and between UNDERWRITERS NATIONAL ASSURANCE CORPORATION (hereafter referred to as UNAC) and the _____ (hereafter referred to as the Guaranty Association)

WITNESSES:

WHEREAS, UNAC is, under the jurisdiction of the Superior Court of Marion County, Room No. 5, now in the custody of the Insurance Commissioner of the State of Indiana under proceedings for rehabilitation; and

WHEREAS, a plan for rehabilitation has been finally approved by the Judge of Superior Court Room No. 5, providing for the rehabilitation of said company; and

WHEREAS, by said plan of rehabilitation the rights of certain policyholders as to protection of the policies issued by UNAC are limited or terminated; and

WHEREAS, the Guaranty Association pursuant to the law of its State, is required to offer certain protections to policyholders who qualify under the law of that State and to guarantee performance of certain of the contracts of insurance issued by UNAC to qualified residents of that State; and

WHEREAS, by the operation of the plan of rehabilitation there will be the following limitations against the rights of said policyholders as they existed prior to said rehabilitation under contracts of insurance issued by UNAC, to-wit:

1. Certain of said policyholders have heretofore had non-cancellable insurance policies which provide in effect that there can be no increase of premium on their

policy during the life of the policy and said policies now have been changed by the plan of rehabilitation to guaranteed renewable policies in which there is a possibility and a probability that there will be an increase in premium.

2. Certain of said policyholders are the owners of policies which have a Return Premium Rider which provides for the return of a certain portion of premium under conditions set out in said policies and that all of said rights of continued effectiveness of any Return Premium Rider are terminated by the plan of rehabilitation;

and both of said rights are guaranteed by the Guaranty Association which is party to this Agreement; and

WHEREAS, it is for the best interests of the policyholders and in the interest of uniform handling and the avoidance of confusion in the servicing of policies existing between UNAC and its policyholders; and

WHEREAS, UNAC will continue as a rehabilitated company in the servicing of the basic coverage of policies heretofore issued by it with the above exceptions;

IT IS, THEREFORE, AGREED BETWEEN THE PARTIES:

1. That UNAC will continue to service the policyholders in the same manner as it has previously done and that all billing for premiums and all collection of premiums and the payment of all claims arising under policies will be made by UNAC, except as hereafter set out.

2. That UNAC will maintain adequate data processing records in order to determine the status of all policyholders and to provide such information to the Guaranty Association to the extent required for the performance of their duties.

3. In the event that an increase in premium is achieved by UNAC for policyholders whose policies are guaranteed

by the Guaranty Association and which were previously non-cancellable policies, UNAC will keep a separate record of said increase and will bill the Guaranty Association for the increase on all policies which the Guaranty Association has certified to UNAC as being properly covered under the Guaranty Association Law.

UNAC will bill the policyholders at the guaranteed rate and will bill the Association for the increase in rate. The Guaranty Association will pay to UNAC the amount of such increase within thirty (30) days after the base premium is paid by the policyholder and UNAC will continue the basic coverages of the policy to the policyholder as if all of said premium had in fact been paid by the policyholder.

4. With regard to Return Premium Riders, if any policyholder desires to continue to carry and pay the premium for Return Premium Rider, UNAC will collect said premium from the policyholders who have been certified as eligible by the Guaranty Association and will hold said funds for the use and benefit of the Guaranty Association, making due accounting therefor monthly.

In the event of maturity of the Return Premium Rider as to any policyholder after the date of this contract, the benefits payable under the Return Premium Rider will be paid by UNAC as agent for this purpose and UNAC will provide the Guaranty Association with all statistical data necessary to determine the amount and eligibility of the claimant to Return Premium Rider benefits and the Guaranty Association will reimburse UNAC within 30 days of notice. For this purpose UNAC will submit for approval a settlement procedure manual for verification and payment of these benefits.

5. Inasmuch as the plan for rehabilitation provides for the exercise of certain options by policyholders and inasmuch as the Guaranty Association will require assignment to the Guaranty Association by assureds whose rights are protected by said Association of all of their rights

under the plan, UNAC undertakes to recognize said assignment and to make payments of the funds and amounts payable to such policyholders under the plan to the Guaranty Association pursuant to said assignment and the Guaranty Association will hold said funds for the purpose of honoring its obligations under the Return Premium Riders which may have matured between August 4, 1974 and the date of this Agreement and which may hereafter mature upon continued payment of premium by the policyholders.

6. In return for its services as set out in this contract UNAC will be paid by the Guaranty Association a fee to be determined on the basis of a determination of the cost of rendering said service.

7. All funds due to the Association and collected by UNAC shall be remitted directly to the Association at such office and address as the Guaranty Association shall from time to time direct and all funds due to UNAC from the Guaranty Association shall be paid directly to the managers of UNAC by said Association within thirty (30) days after receiving invoice therefor.

8. The Association shall be entitled to require an audit at its expense at any reasonable time to review all payments and receipts contemplated by this contract.

9. No agents commission shall be paid or charged on any amount collected for or paid by the Association.

10. The parties consider that payments by the Association of the amounts representing difference between basic guaranteed premium and the new premium are not premium but are a fee paid by the Association to UNAC to induce UNAC to continue the policy without increase of premium.

11. Monies paid by the policyholder to preserve his rights under the Return Premium Rider are not a premium for coverage but are a deposit to preserve the rights of the

policyholder under the Guaranty Association statute and the Association is not an insurer but is a guarantor only.

12. If any premium tax is charged by any state on any payment made by or to the Association under this contract, the Association will hold UNAC harmless and reimburse said expense.

13. This Agreement shall be binding on the parties and their successors and assigns, including any succeeding management of UNAC.

14. The parties contemplate that this contract shall remain in force so long as the liability of the Association continues and UNAC remains in business. However, the parties may terminate the contract by mutual agreement or either party shall be entitled to require termination with six (6) months notice to the other in writing.

9.

STATE OF INDIANA)		IN THE SUPERIOR COURT
) SS:		OF MARION COUNTY,
COUNTY OF MARION)		ROOM NO. 5
DEPARTMENT OF INSURANCE, STATE OF INDIANA,	)	
Petitioner,	)	
	)	CAUSE NO.
vs.	)	S574-851
UNDERWRITERS NATIONAL ASSURANCE COMPANY,	)	
Respondent.	)	

ORDER AND MEMORANDUM APPROVING PLAN OF REHABILITATION AND SETTLEMENT OF CLAIMS AND LITIGATION

This cause comes before the Court for final consideration of the Proposed Rehabilitation Plan for Underwriters National Assurance Company ("UNAC") which was tentatively approved by the Court on July 19, 1976, for final consideration of all other proposals concerning, or objections to, the tentative plan and for final consideration of the settlement of all claims and litigation involved in this rehabilitation proceeding.

Pursuant to the Order Concerning Procedure To Be Followed in Considering Rehabilitation Plans, dated March 19, 1976, and pursuant to notice sent to all parties who have appeared by counsel in this proceeding, the Court on June 9, 1976, heard evidence and argument concerning the various plans and proposals for rehabilitating UNAC. After the hearing, the Court on July 19, 1976, entered its Order Approving Tentative Plan of Rehabilitation and

Settlement of Class Action Claims, tentatively approving a plan of rehabilitation for UNAC and setting forth the procedures to be followed in mailing the tentative plan and the notice of the final hearing to all interested parties. On July 30, 1976, the Court entered an additional Order concerning those procedures. As set forth in the Certificate of Compliance with Orders Concerning Mailing of Tentative Plan of Rehabilitation, filed by the Rehabilitator on October 12, 1976 UNAC has complied with the Court's Orders of July 19, 1976, and July 30, 1976.

On October 14, 1976, and October 20, 1976, the Court heard additional evidence and argument relating to the tentative plan and the various plans, proposals and objections concerning the rehabilitation of UNAC. The Court has also received numerous letters and comments from persons interested in the affairs of UNAC, principally policyowners, concerning the tentative plan and the effect of rehabilitation upon individual rights. The numerous parties to this rehabilitation proceeding have filed various stipulations, briefs, arguments, and suggestions.

Having considered the evidence, arguments, pleadings, correspondence, proposals and all other matters presented to the Court in this lengthy rehabilitation proceeding, the Court makes the following findings:

1. The Court has jurisdiction over the subject matter and over the parties, including UNAC, UNAC International Corporation, all UNAC policyowners, creditors, agents, brokers or managers, state insurance guaranty associations, and shareholders of UNAC International Corporation.

2. The Plan of Rehabilitation for Underwriters National Assurance Company ("Plan") in the form attached hereto as Exhibit A is equitable and treats fairly each class of policyowners. The Plan makes adequate provision for the rights and interests of policyowners, creditors, agents and stockholders and the other persons interested in the affairs of UNAC.

3. The Plan is approved by the Court is the most feasible program for correcting or removing the causes and conditions which made the UNAC rehabilitation proceeding necessary and for restoring UNAC to viable financial status. The Plan accomplishes the purposes of the rehabilitation proceeding and complies with the Indiana Insurance Laws, including IC 27-1-4-2.

4. The Court has thoroughly considered all claims, objections and proposals filed by the various parties herein. To the extent that any such claim, objection or proposal is inconsistent with the Plan, the Court finds that the claim, objection or proposal should be overruled and relief to that extent denied.

5. The Court finds that the mailing of the tentative plan and Notice of Hearing, as evidenced by the Certificate of Compliance with Orders Concerning Mailing of Tentative Plan of Rehabilitation, filed by the Rehabilitator on October 12, 1976, constitutes the best notice practicable under all of the circumstances and requirements of due process of the proposed rehabilitation of UNAC and of the rights and duties of the interested parties with respect thereto.

6. Since the Order of Rehabilitation was entered on August 5, 1974, the Indiana Department of Insurance, as Rehabilitator of UNAC, has acted pursuant to the Orders of this Court within the applicable statutes. Although objections have been filed, no evidence of any sort has been offered which suggests that the Rehabilitator or its agents or employees acted in any way inconsistent with statutory or common law duties. Moreover, the evidence failed to show any grounds for not discharging the Rehabilitator and its agents and employees from liability for their acts incident to the rehabilitation of UNAC. Such a discharge is in addition to the statutory immunity of the Department pursuant to IC 27-1-3-1 and IC 34-4-16.5-3. However, a discharge will beneficially affect the carrying out of the

Plan by eliminating the assertion of contingent claims to indemnity rights and the assertion of other claims and allegations that may deter the employment of management for the rehabilitation of the Plan.

Further, the Plan, after due hearing, adjudicates and discharges all pending claims, and assertions as they relate to the Rehabilitator or the process of rehabilitation.

7. The Voting Trust and Depositary Agreement in the form attached hereto as Exhibit B is the most appropriate method presented to the Court for implementing part VIII(A) of the Plan, and should be approved by the Court.

It is, therefore,

ORDERED, ADJUDGED AND DECREED:

(1) The Plan is hereby adopted and approved in the form attached hereto as Exhibit A.

(2) The Voting Trust and Depositary Agreement is hereby approved in the form attached hereto as Exhibit B.

(3) To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims or litigation by any past or present UNAC policyowners, UNAC International Corporation, UNAC agents, brokers or managers, UNAC officers and directors, UNAC creditors, and shareholders of UNAC International Corporation against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed.

(4) UNAC is directed, after termination of this rehabilitation proceeding (a) to cause the Plan, a data sheet concerning the exercise of individual policyowner options, a cover letter from UNAC or the Rehabilitator and this Order to be printed or otherwise reproduced and mailed to each of the persons who received the mailing directed by

the Court's Orders of July 19, 1976, and July 30, 1976; (b) to pay the printing and mailing at UNAC's expense; and (c) to file or cause to be filed with the Court a Certificate of Compliance identifying the parties to whom the Plan, the data sheet, the cover letter and this Order were mailed and stating the amount of costs incurred in connection with printing and mailing.

(5) UNAC and the Rehabilitator are authorized and directed to do all acts necessary or appropriate to cause to be implemented the provisions of the Plan and the Voting Trust and Depositary Agreement subject to the approval of the Court. To the extent that any provision of the Plan cannot be fully implemented because of the lack of approval of regulatory authorities in Canada or the United Kingdom, UNAC and the Rehabilitator are authorized and directed to implement the provision to the extent possible at the time of termination of this rehabilitation proceeding. Without limiting the generality of the preceding sentence, UNAC is authorized and directed to make distributions under the Plan of liquidated cash values, after termination of this rehabilitation proceeding, based upon calculations which exclude from the assets of UNAC the fair market value in exchange dollars of assets on deposit in Canada and the United Kingdom. If UNAC believes that such distributions to policyowners in the United States or in Canada or in the United Kingdom should not be made until approval of regulatory authorities in Canada or the United Kingdom or until other provision is made for policies of Canadian or United Kingdom policyowners, then UNAC shall petition the Court for authority to delay such distributions.

(6) All parties of interest are directed to nominate to the Court within 30 days names and biographical data of nominees to serve under the Voting Trust and Depositary Agreement.

(7) Following approval by the Court of from five to eleven Trustees, the names of the persons so approved and selected shall be published. UNAC International Corporation, the policyowner class representatives and the Trustees are directed to execute the Voting Trust and Depositary Agreement promptly thereafter. Within 30 days after execution the Trustees shall meet and elect the Board of Directors of UNAC. Upon election by the Board, the President and Secretary of UNAC shall immediately thereafter execute the Voting Trust and Depositary Agreement on behalf of UNAC. However, the Voting Trust and Depositary Agreement shall be a binding obligation of UNAC from the date of this Order.

(8) UNAC International Corporation is directed to do all acts and things necessary or appropriate to cause to be carried out its obligations under the Plan and the Voting Trust and Depositary Agreement, including, but not limited to, surrender and transfer of its certificate or certificates for all shares of UNAC stock to the Depositary in exchange for voting trusts certificates.

(9) The policyowner class representatives are directed to do all acts and things necessary or appropriate to cause to be carried out their obligations under the Plan and the Voting Trust and Depositary Agreement.

(10) This Order is final as to all matters occurring prior to the date of this Order. The Court shall retain jurisdiction over the parties and over this rehabilitation proceeding on petition of any interested party or the Indiana Department of Insurance (a) to resolve all questions as to interpretation and implementation of the Plan and as to the application of the Plan to specific facts and circumstances and (b) to modify, amend or supplement the Plan in any respect in the light of future developments. The Court shall also retain jurisdiction over the parties and over this rehabilitation proceeding during the implementation of the Plan to the extent necessary or appropriate to assure compliance with

the provisions of the Plan and the Voting Trust and Depositary Agreement and to resolve all questions in that respect. The Rehabilitator (and after termination of this proceeding, the Indiana Department of Insurance), with the approval of the Court, insofar as it does not materially and adversely affect the interests of the policyowners, shall supply any defects or omissions or reconcile any inconsistency in the Plan in such a manner and to such extent as may be necessary or appropriate to carry out the Plan. The Rehabilitator, Trustees and the Indiana Department of Insurance are authorized and directed to bring to the attention of the Court all matters coming to the attention of the Rehabilitator or the Indiana Department of Insurance which, in the judgment of the Rehabilitator, Trustees or the Indiana Department of Insurance, require or warrant the exercise by the Court of the continuing jurisdiction hereby retained.

(11) Counsel for the policyowner class and stockholder class shall submit to the Court, to UNAC and to the Rehabilitator sworn statements of the dates, nature of services and time expended in connection with this rehabilitation proceeding since April 1, 1976. Such sworn statements shall not include services and time expended in any other proceeding of matter, specifically including, but not limited to, the litigation now pending in the Hamilton Superior Court that has been the subject of previous fee petitions in this proceeding. To the extent that the time included in any such sworn statement is approved by order of this Court, UNAC is authorized and directed to compensate the counsel submitting such statement at the rate of Fifty Dollars ($50) per hour for such time. UNAC is also directed to pay all legal fees and expenses and expenses heretofore and hereafter incurred by the Rehabilitator, UNAC, or the Indiana Department of Insurance in connection with this rehabilitation proceeding, including any fees for services rendered in the implementation of this Order, whether prior to or subsequent to the termination of

this proceeding. "UNAC is also directed to pay all expenses heretofore and hereafter issued by the policyowners and stockholder class counsel for services rendered in the implementation of this Order, whether prior to or subsequent to the termination of this proceeding."

(12) Upon election of the Board of Directors of UNAC as directed in paragraph (7), UNAC shall be released from rehabilitation, and UNAC shall be permitted to resume possession of its property and the conduct of its business pursuant to IC 27-1-4-2, and this rehabilitation proceeding shall be terminated, subject, however, to the continuing jurisdiction retained by the Court. Upon such termination the Rehabilitator shall no longer serve in such capacity, and the Indiana Department of Insurance shall have the same relationship to UNAC as to any other insurance company organized under the laws of this State, except as specifically provided in the Plan. The right of the Indiana Department of Insurance pursuant to part VIII of the Plan to maintain a representative at UNAC's office after termination of this proceeding shall not any duty or obligation of the Department or any officer, agent or employee thereof to the State of Indiana or any other entity or person that does not exist apart from that provision of the Plan.

(13) The Indiana Department of Insurance and all of its present and former Commissioners, officers, agents and employees are hereby discharged from any and all liability for their acts incident to the rehabilitation of UNAC prior to the date of this Order. Upon the election of the Board of Directors of UNAC as directed in paragraph (7) the Rehabilitator may apply to the Court for a supplemental discharge from any and all liability for acts incident to the rehabilitation of UNAC after the date of this Order but prior to the election of the Board of Directors. Nothing in this Order shall affect any defense the Indiana Department of Insurance or any officer, agent or employee thereof may have, based on sovereign immunity or any other ground, to

any claim or contention relating to any act prior to, during or after this proceeding.

(14) Each party to this proceeding shall bear its or his own costs except as specifically set forth in paragraph (11).

/s/ Michael T. Dugan, II, Judge
Superior Court No. 5, of
Marion County

DATE: November 22, 1976

IN THE SUPERIOR COURT
OF MARION COUNTY,
ROOM NUMBER FIVE.
CAUSE NO. S 574-851

DEPARTMENT OF INSURANCE STATE OF INDIANA,	)	
Petitioner,	)	
VS.	)	MEMORANDUM
UNDERWRITERS NATIONAL ASSURANCE COMPANY,	)	
Respondent.	)	

I. STATEMENT OF FACTS

UNAC is a class I capital stock Indiana Insurance Company meaning it is authorized and licensed under the Indiana Insurance Code of 1935 (Acts 1935, Ch. 152, Sec. 59 Burn's Ind. Stats. Ann. §27-1-2-1) to write life, disability and health and accident insurance. UNAC International is an Indiana holding company operating under the Indiana Insurance holding company statute and regulations (Burn's Ind. Stats. Ann. §27-1-23-1) and owning all the issued and outstanding shares of UNAC. UNAC was incorporated in 1961 and has outstanding capital stock of 971.079 shares, (all one class) with a par value of $1.50 per share, amounting in dollars to a paid in capital of $1,456,518.50 (1974 Annual Report.).

UNAC International was incorporated in 1970 and has 1,254,505 shares of stock, all common, issued and outstanding and owned by 2,033 shareholders (As of September 5, 1975).

In 1974, the Department of Insurance caused its examiners to make an examination of UNAC's 1973

Annual Report of financial conditions and affairs, particularly with respect to its reserve for payment of claims and the return of Premium Rider Reserve. This report concluded that such reserves were inadequate and that if such reserves were not made adequate by the company, its capital and surplus accounts would be impaired, which would authorize the Department to take action under Burn's Ind. Stat. Ann. §27-1-3-19. The Department, thereupon, through the Attorney General of Indiana, filed suit on August 5, 1974, asking for "rehabilitation" under said §27-1-13-19.

On August 5, 1974, in response to the Department of Insurance' petition for rehabilitation this Court (Marion County Superior Court Room Five) ordered the Department of Insurance of the State of Indiana "to take possession of the business and assets of UNAC and conduct the business thereof and appoint such personnel as may be necessary to rehabilitate UNAC as permitted by Burns' Ind. Stats. Ann §27-1-4-2."

The following entries represent a chronology of the events which have occured subsequent to the order of rehabilitation of August 5, 1974:

September 16, 1974, the Court issued a "blanket" injunction which enjoined the commencement or prosecution of any suit, action, or other proceeding on behalf of, in the name of, or against UNAC or the Rehabilitator. The order made specific reference to the *B. M. Honeycutt et. al. vs. UNAC* action filed August 8, 1974 in the U.S. District Court for the eastern district of Virginia, and the *Robert Schultz vs. UNAC* action filed August 2, 1974 in the Circuit Court of Cook County, Illinois. The order enjoined the taking of any further action with respect to those two pending actions. Said injunction also ordered that all persons desirous of instituting or prosecuting any action or proceeding should do so as part of the rehabilitation proceeding or, in the alternative, to seek leave of "this" Court to do so elsewhere.

September 26, 1974, Robert Schultz on behalf of all UNAC policyholders with RPR provisions in their policies of insurance petitioned to intervene in the rehabilitation proceedings.

January 9, 1975, B. M. Honeycutt's petition to intervene on behalf of himself and all other persons who purchased PRR policies from UNAC was granted by court order.

January 23, 1975, The Airline Pilots Insurance Agency, Inc. motion for leave to intervene was granted by court order. The Airline Pilots Insurance Agency, Inc. is a Florida corporation which was formed exclusively for the purpose of soliciting and procuring the sale of insurance policies with PRR provisions. Said Insurance Agency did so on its capacity as the health assurance underwriter for UNAC.

June 18, 1975, UNAC International was granted leave to intervene in the rehabilitation proceedings by court order.

July 15, 1975, Richard C. Lindop, Ralph K. Lindop, Eilliam Aarmelin, Alfred Trafford, Samuel A. Croland, Michael C. Bernstein and Robert Osler petition for leave to intervene on behalf of themselves and as representative parties of a "class" comprised of all the shareholders of UNAC International capital stock, UNAC International being the holding company and parent of UNAC.

September 15, 1975, Court order designating the aforementioned persons as representative parties of all the shareholders' of UNAC International and authorizing the same to maintain a class action on behalf of all the shareholders on UNAC International was entered.

October 30, 1975, Court order entered declaring that the *B. M. Honeycutt et al. vs. UNAC* action be maintained as a class action pursuant to Indiana TR 23 for the benefit of the class of "all policyholders who hold now or have held contracts of insurance with UNAC".

December 1, 1975, James A. Newpher filed a petition for leave to intervene in his own behalf.

February 24, 1976, Newpher by written motion moves the Court to convert his intervening petition into a class action.

December 2, 1975, The Department of Insurance of the State of Indiana ex. rel. UNAC, Robert Schultz and B. M. Honeycutt, et. al. petitions the Court for leave to file suit against certain officers and directors of UNAC.

December 2, 1975, the Department in its representative capacity as Rehabilitator of UNAC files suit against certain officers and directors of UNAC in Marion County Superior Court Room Number Five.

December 12, 1975, the Court grants a motion for change of venue in the action by the Department against the officers and directors and by agreement of the parties dated December 15, 1975, the matter is transferred to the Superior Court of Hamilton County.

January 1, 1976, Cal-Lind Funding Corporation files a petition for leave to intervene in the rehabilitation proceedings.

March 8, 1976, the Court grants the Cal-Lind petition.

March 18, 1976, Cal-Lind files a complaint against UNAC.

June 8, 1976, a motion to intervene is filed by certain State Guaranty Associations and is granted by court order on June 11, 1976.

February 6, 1976, The Department of Insurance as Rehabilitator submits a summary of a proposed plan of rehabilitation.

March 6, 1976, the Court orders "all parties presently represented in the rehabilitation proceeding and Guaranty Reserve Life Insurance Company" to file any alternative rehabilitation plans for UNAC or to file any objections to the Rehabilitator's proposed Rehabilitation Plan for UNAC on or before April 16, 1976. The Rehabilitator is

directed by said order to file and modifications to his February 6, 1976, proposed plan on or before April 23, 1976. The order sets June 9, 1976, as the date for an initial hearing on the respective merits of the proposed plans.

April 23, 1976, the Department of Rehabilitation files an amended plan of rehabilitation.

June 9, 1976, a hearing on the evidence is held.

June 19, 1976, the Court tentatively approves the Rehabilitator's proposed plan of April 23, 1976, as the proposed plan for the rehabilitation of UNAC. The Court in said July 19, 1976 order sets October 14, 1976, as the date for the final hearing on the tentative plan.

October 14, 1976, the Court convenes the final hearing on the evidence. All evidence is complied by October 20, 1976 when evidence is heard concerning the Cal-Lind claim. October 29, 1976 is set as the final date for the post-trial briefs and the case is taken under advisement until November 22, 1976.

The following entries represent those interested parties who have submitted either an alternative plan to the tentatively adopted plan of April 23, 1976, or those interested parties who have submitted objections to the April 23, 1976 Proposed Plan for the Rehabilitation of UNAC. (note: the objections and alternative plans for the most part refer to the February 6, 1976 proposed plan which was amended in minor part by the April 23, 1976 plan and then, tentatively approved by the Court on July 19, 1976.)

1. The class of shareholders of UNAC International submitted a proposed plan of rehabilitation on December 5, 1975. On February 23, 1976, this same representative class submitted a pleading titled "Objections and Proposed Amendments to the Proposed Plan of Rehabilitation filed by the Department of Insurance on February 6, 1976." On April 15, 1976, the class of shareholders submitted an

addendum to their proposed plan of rehabilitation of December 5, 1975.

2. By letter of February 13, 1976, the New Hampshire Department of Insurance submitted a proposal suggesting a way to resolve the State Guaranty Association—third party claim dilemma.

3. April 12, 1976, H. Nelson Brown, Jr., Guy T. Connelly, Robert I. Cummin, Lloyd P. Grissom, William Harmelin, W. Foster Montgomery, Richard Moser, Selden Sheffield, Alred H. Trafford and Herman L. Trautman (the aforementioned persons are defendants in the Hamilton County action) file objections to the Rehabilitation plan of February 6, 1976.

4. April 14, 1976, Bruce Bowers and Carl J. Rennekamp (defendants in the Hamilton County action) file objections to the Rehabilitator's proposed plan dated February 6, 1976.

5. April 15, 1976, Ralph K. Lindop and Richard Lindop (defendants in the Hamilton County action) file objections to Rehabilitator's proposed plan of February 6, 1976.

6. September 14, 1976, H. Nelson Brown, Jr., Guy T. Connelly et al (defendants in the Hamilton County action) file objections to the proposed rehabilitation plan tentatively approved on July 19, 1976.

7. April 14, 1976, the class of policyholders represented by B. M. Honeycutt, et. al. file objections to the Rehabilitator's proposed plan.

8. April 15, 1976, Guarantee Reserve Life Insurance company files objections to the Rehabilitator's proposed plan.

9. June 9, 1972 [sic], Guarantee Life submits a brief in support of it's April 15, 1976 objections to the Rehabilitator's proposed plan.

10. July 13, 1976, Guarantee Life submits a brief in reply to the opposition brief of the Rehabilitator.

11. April 15, 1976, Cal-Lind Funding Corporation file objections to the Rehabilitator's proposed plan.

12. April 19, 1976, Samuel J. Furlin, policyholder, filed objection to the Rehabilitator's proposed plan.

13. June 8, 1976, Indiana National Bank, as a secured creditor of UNAC International, files objections to the Rehabilitator's proposed plan and a request to be heard at the final hearing on said plan.

II. JURISDICTION

The statutory basis for the Court's power to alter the terms of the existing policies, affect the rights of creditors, shareholders and agents, and bind nonconsenting parties, flows from the Indiana insurance rehabilitation statute, IC 27-1-4-2, Burns §39-3402:

> (a) An order to rehabilitate a domestic insurance company shall direct the department to take possesion of the property of such insurance company and to conduct the business thereof and/or to take such steps toward the removal of the causes and conditions which have made such proceedings necessary as the court shall direct.
>
> (b) At any time the department shall deem that further efforts to rehabilitate such insurance company would be futile, it may apply to the court under this article [§§ 39-3401—39-3430] for an order of liquidation.
>
> (c) The department, or any interested person, upon due notice to the department, at any time, may apply for an order terminating this proceeding and permitting such insurance company to resume possession of its property and the conduct of its business, but, no such order shall be granted except when, after a full hearing, the Court shall determine that the purposes of the rehabilitation proceeding have been accomplished."

While the other sections of the statute spell out in some detail the procedures to be followed in liquidating a distressed insurance company, there is no corresponding specificity concerning rehabilitation.

The Indiana rehabilitation statute directs the Department of Insurance as a Rehabilitator of a distressed insurance company "to take such steps toward the removal of the causes and conditions which have made such [rehabilitation] proceedings necessary as the court shall direct." IC 27-1-4-2(a), Burns §39-3402(a)

That once a Court in a rehabilitation or liquidation proceeding acquires jurisdiction that such jurisdiction vests in such a court to the exclusion of all other courts. The rule is that when a court of competent jurisdiction has taken possession of property through its officers, that property is withdrawn from the jurisdiction of all other courts, which, although having concurrent jurisdiction, may not disturb that possession. The court which originally acquires jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. This rule applies, even though the court, through its receiver, has not secured actual physical possession of the property of the debtor. *Genecou vs. Wine* (1940) 109 F. 2°265; *American Cast Iron Pipe vs. Statesman Ins. Co.* (1972), 343 Supp. 860.

Courts regularly provide full faith and credit to rehabilitation proceedings in other jurisdictions. *Hutchins vs. Pacific Mutual Life Insurance Co. of California*, (1938) 97 F2° 58, is an example. Hutchins involved a suit by a shareholder of the then reorganized insurance company seeking to set aside the earlier entered rehabilitation plan alleging that it was the product of a conspiracy between the rehabilitator and the new company's directors. The Court, after noting that the Rehabilitator acts as a trustee for the benefit of all creditors and interested parties, stated at page 60 of the text of the opinion:

> "Having acquired possession of the res by appropriate action, the state court drew to itself the power to determine, subject to review on appeal or certiorari, all questions germane to the proceeding. (court had earlier pointed out that under statute the State court had assumed jurisdiction over the business and assets of the insurance company) as said in *Lion Bonding and Surety Company vs. Karatz*, supra, (page 486) 'If the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court'. The way was open to appellant, by intervention in the State court, to be heard on all matters sought to be litigated here. These questions have been as effectively withdrawn from the jurisdiction of the lower federal courts as has the property of the insurance company itself."

Podway vs. Pacific Mutual Life Insurance Co. of California (1940) 42 F.Supp. 569, is a 7th Circuit Case which is applicable. *Podway* involved a plaintiff as a holder of two noncancellable disability policies who was represented and protected through class representation in California proceedings, resulting in orders made by the Superior Court of Los Angeles County approving the rehabilitation and reinsurance plan and directing the insurance commissioner to transfer and assign the incurer's assets to the new company.

Full faith and credit was required to be given to those orders by the federal district court in Wisconsin and the plaintiff who took no action to accept or reject the reinsurance and assumption of policies by the new company in accordance with the terms of the plan was bound by the California proceedings even though he did not personally appear. The court in so holding observed that the California proceedings were valid and constitutional in that there was jurisdiction and procedural due process had been met, ie., notice and opportunity to be heard had been given to all interested parties. The plaintiff even though not

present had been represented in said proceedings through virtual or class representation and thusly full faith and credit was given to the orders and judgement of the California courts.

The Rehabilitation Court is bound to insure that the provisions of the Plan of Rehabilitation are carried out. The Court is also bound to insure that the spirit of the plan as it relates to the successful rehabilitation of the company is followed.

Where the insurance company makes an application for an order to terminate the conservatorship it must show that the grounds on which the company was taken over by the insurance commissioner have been removed, and the burden of proof in this respect, as well as the burden of proving that the company can properly resume title and possession is on the company. Whether the present circumstances justify termination of the concervatorship is a matter within the sound discretion of the trial court. The determination of the trial court on competent testimony without abuse of discretion that the control of the business of the insurance company should be returned to the company by the conservator is binding in the courts review. *(Caminetti vs. Prudence Mut. Life* 146 P2°15)

In *Caminetti vs. Imperial Mut Life* 139 P 2° 681 (1943), the Court noted (at page 690)

> "This (conservatorship or rehabilitation) being a special proceeding, the jurisdiction of the Court is limited by the terms and conditions of the statute under which the proceeding is instituted....There was but one question before the court and that one was as to the right of appellant commissioner to operate respondent's insurance business, or whether the control and operation of such business should be withdrawn from the commissioner and restored to respondent. When by its judgement the court decided this issue in favor of respondent, it completely and effectively exhausted the court's jurisdiction.

I.C. 27-1-4-2(c)

"The department, or any interested person, upon due notice to the department, at any time, may apply for an order terminating this proceeding and permitting such insurance company to resume possession of its property and the conduct of its business, but, no such order shall be granted except when, after a full hearing, the Court shall determine that the purpose of the rehabilitation proceeding have been accomplished."

/s/ Michael T. Dugan, II, Judge
Marion Superior Court, No. 5

Dated: November 22, 1976

PLAN OF REHABILITATION
FOR
UNDERWRITERS NATIONAL ASSURANCE COMPANY ("UNAC")

I. *Summary of the Rehabilitation Plan.*

A. *Basic Coverage.* All policyowners will be offered continuation of basic coverage subject to the changes specified in Part III. It is anticipated that premium increases will be necessary on accident and health and disability policies in the future, including those noncancellable policies modified to be guaranteed renewable. No change is anticipated on life insurance policies.

B. *Return of Premium Rider ("RPR") Benefits.* All RPR benefits will be terminated. RPR premiums received by UNAC on or after August 5, 1974, will be refunded. Policyowners with RPR at August 4, 1974, would receive a cash payment equal to 15.68% of the additional premium paid for the RPR received through August 4, 1974. See Parts III and IV.

C. *Liquidated Cash Value Payments.* As set forth in Part V, all policyowners will have an option to receive a liquidated cash value payment in lieu of accepting the changed policy provisions. See Part III also.

D. *Policyowners Who Accepted the July 9, 1974, Offer.* The policyowners who accepted the July 9, 1974, offer and terminated basic coverage will be offered a reinstatement of basic coverages as specified in Part IV(C).

E. *Agents' Commissions.* Agents' commission agreement will be modified as specified in Part VII.

EXHIBIT A

F. *Structural Changes in UNAC.* As set forth in Part VIII, UNAC's common stock will be placed in a voting trust to provide for representation of policyowner interests on UNAC's Board of Directors. The Department of Insurance may maintain a representative at UNAC's office for two years or such additional period as the Department deems advisable, and new management will be selected.

G. *Additional Policy Benefits.* As set forth in Part XI, UNAC will attain a minimum initial capital and surplus of $2,500,000 through a reduction in liabilities to policyowners. A corresponding policy benefit will be created for the RPR policyowners as of August 4, 1974, conditionally obligating UNAC to make return of premium payments aggregating $2,500,000, plus interest, to such policyowners within ten years.

H. *Participating Policies.* To the extent UNAC generates profits from the basic coverage as restructured, those profits will be returned to the policyowners in the form of policy dividends as set forth in Part III(I).

I. *Third Party Recoveries.* As described in Part IX, any recovery from others as a result of legal action or claims by the Department or UNAC after rehabilitation will inure to the benefit of the RPR policyowners as of August 4, 1974. See Part X(C) also.

J. *Contingent Liabilities.* The Rehabilitation Plan resolves certain liabilities of UNAC as follows: UNAC purchased certain policies, principally RPR policies, from Guarantee Reserve Life Insurance Company in 1968. UNAC will have no obligation to Guarantee. Cal-Lind Funding Corporation has made claims against UNAC

based upon three agreements between Cal-Lind or its subsidiary and UNAC. UNAC will have liability to Cal-Lind or its subsidiary. UNAC will have no liability to any guaranty association which itself has obligations to UNAC's policyowners, except as set forth in Part X(C). UNAC will have no liability to any other party whose rights or claims are not dealt with by the Rehabilitation Plan *and* are not recognized by the Department as being valid prior to the effective date of the Rehabilitation Plan. See Part X.

K. *Settlement of Litigation and Claims.* As set forth in Part XIII, in consideration of the provisions of the Rehabilitation Plan, all claims against UNAC by policyowners will be compromised and dismissed, and all persons will be discharged from any liability for acts during the rehabilitation of UNAC.

II. *Definitions.*

The following terms have the following meanings as used in this Rehabilitation Plan.

Department: The Department of Insurance of the State of Indiana or the Commissioner of Insurance of the State of Indiana, as Rehabilitator of UNAC under the Indiana Insurance Laws.

UNAC: Underwriters National Assurance Company.

International: UNAC International Corporation, the holding company owning all the stock of UNAC.

Rehabilitation Court: The Superior Court of Marion County, Indiana, Room No. 5, where the UNAC rehabilitation proceeding is pending as Cause No. S574-851.

Return of Premium Rider ("RPR"): A rider attached to most of the policies issued by UNAC, promising

return of a portion of the paid premiums if certain conditions are met, generally that no claims under the terms of UNAC's policies are asserted under the basic coverage for a period of ten years in excess of a stated percentage of premiums.

Basic Coverage: All insurance coverage except any return of premium rider.

Non-Cancellable Policy: An accident and health policy of insurance containing a provision that the policy may not be cancelled or amended in any respect (including adjustments to premiums) except for non-payment of premium.

Guaranteed Renewable Policy: An accident and health policy of insurance containing a provision that the policy may not be cancelled in any respect except for nonpayment of premium; however, UNAC has the right from time to time to modify the scale of renewal premium rates based upon experience by class.

Active Claim: An existing claim under any contract of insurance issued by UNAC in which benefits are currently being paid or are currently payable.

RPR Restart Date: That date when the 10-year accrual period in the return of premium rider starts over again. A restart may be effected in any of the following ways:

1. Lapse and subsequent reinstatement of the policy with a break in coverage during which no premiums are collected.
2. Inception date of a new 10-year accrual period after the completion of a previous 10-year accrual period.
3. Inception of a new 10-year period when claim benefits paid exceed the claim percentage allowance in the return of premium rider.

Commissions: Any fees or compensation paid to an agent, manager, supervisor, or general agent in the form of actual commissions, over-rides, or service fees.

III. *Options to Policyowners.*

UNAC has written a variety of accident and health coverages and life coverages during the period it has been authorized to write insurance. Principal lines written include the following: (1) Life Insurance—UNAC has offered the usual portfolio of life insurance coverages written through individual agents and brokers. UNAC's principal life product in terms of sales has been a flexible premium life policy offering a combination of term insurance and an accumulation fund used to purchase paid-up life insurance at the insured's 65th birthday; (2) Guaranteed Renewable Medical Expense and Accident and Health Products—UNAC has offered hospital, medical and surgical policies providing scheduled indemnities for various kinds of medical care, principally hospital confinement. Under UNAC's major medical coverages, the policyowner is reimbursed for eligible medical expenses after satisfaction of a deductible; (3) Disability Products—UNAC has written a variety of disability coverages over the years with some business written on a guaranteed renewable premium basis. Most disability business, however, has been written on a non-cancellable basis. Disability coverages provide a monthly benefit payable (after satisfaction of a waiting period) for the earlier of the period specified in the contract or the date the insured recovers from his disability.

Specific options will be available to each policyowner depending on the type of basic coverage held on September 30, 1975. If a policyowner fails to make an

election, he will be deemed to have elected Option 2. For RPR policyowners, these options will be in addition to the refund of all RPR premiums paid after August 4, 1974.

THE ELECTION OF OPTION 1 BY A POLICYOWNER WILL CONSTITUTE AN ABANDONMENT OF ANY FURTHER RIGHTS OR CLAIMS SUCH POLICYOWNER MIGHT HAVE UNDER HIS POLICY OR OTHERWISE, EXCEPT AS PROVIDED IN PART IX, THIRD PARTY RECOVERIES, AND AS PROVIDED IN PART XI, ADDITIONAL BENEFITS TO RPR POLICYOWNERS. POLICYOWNERS WITH RPR WHO ELECT OR HAVE BEEN DEEMED TO HAVE ELECTED OPTION 2 WILL BE CONSIDERED TO HAVE WAIVED ANY RIGHTS OR CLAIMS TO RPR BENEFITS THEY MIGHT BE ENTITLED TO ASSERT AGAINST THE GUARANTY ASSOCIATIONS IN THOSE STATES HAVING SUCH GUARANTY ASSOCIATIONS.

The options set out below do not include an increase in premiums. However, in changing non-cancellable policies to guaranteed renewable policies, UNAC will have the right, subject to any required regulatory approvals, to increase premiums in the future.

A. *Non-Cancellable Disability Policyowners with RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Receive RPR liquidated cash value and retain basic coverage as modified to be a guaranteed renewable policy.

B. *Non-Cancellable Disability Policyowners without RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage as modified to be a guaranteed renewable policy.

C. *Guaranteed Renewable Disability Policyowners with RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage, as is, and receive RPR liquidated cash value.

D. *Guaranteed Renewable Disability Policyowners without RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage, as is.

E. *Guaranteed Renewable Medical Expense Policyowners with RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage, as is, and receive RPR liquidated cash value.

F. *Guaranteed Renewable Medical Expense Policyowners without RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage, as is.

G. *All other Accident and Health Policyowners without RPR.*

Option 1. Liquidated cash value, determined as of September 30, 1975;

or

Option 2. Retain basic coverage as is.

H. *All Life Insurance Contracts.*

No options available, coverage remains as is.

I. *Non-Cancellable Policyowners' Participation in Future Underwriting Profits.*

1. Non-cancellable policyowners who elect to retain basic coverage with UNAC as modified to be guaranteed renewable policies will participate in future underwriting profits from the basic coverage, if any, if UNAC in the form of annual policyowner dividends.

2. The future underwriting profits will be defined as those amounts earned in excess of expenses, claims, and reserve requirements on premiums collected from all non-cancellable policyowners who elected to retain basic coverage with UNAC. However, UNAC will be under no obligation to pay annual dividends in excess of an amount equal to any premium increases subsequently imposed. To the extent there are additional profits, those profits will be used to retire the Limited RPR in Part XI.

3. Only those policyowners who hold contracts in force at the time an annual policyowner dividend, if any, is declared will participate in such annual policyowner dividends.

4. Annual dividends, if any, will be paid in the form of a credit toward future premiums due, unless the policyowner requests in writing that the dividend be paid in cash.

IV. *RPR Benefits.*

A. *Refund of RPR Premiums Since Rehabilitation.*

All RPR premiums collected on or after August 5, 1974, will be refunded in full to the policyowner who has paid the premium, including those who have lapsed or surrendered their policy subsequent to August 4, 1974.

B. *Cash Payment for RPR Benefit Prior to Rehabilitation.*

A calculation will be made of the RPR premiums paid from the effective date of the RPR or the latest RPR Restart Date through August 4, 1974, on each policy with an RPR in force on August 4, 1974. Each policyowner will receive a payment of 15.68% of the additional premium paid for the RPR paid to that date. The payment to any policyowner who elected a refund of RPR premium under UNAC's buyout offer of July 9, 1974, exceeded the amount payable under this provision. Accordingly, those policyowners will receive no payment under this provisions.

C. *Policyowners Affected by UNAC "Buy-Out" Proposal of July 9, 1974.*

1. Any policyowner who terminated his basic coverage as a result of the buy-out offer made by UNAC on July 9, 1974, will be given the opportunity to reinstate his basic coverage as modified to be a guaranteed renewable policy under the following guidelines:

(a) Reinstatement will be on a current date basis, in accordance with the reinstate-

ment provision of the policy and without collection of back premiums.

(b) The applicant must submit a personal statement of good health and must be employed on a full-time basis in his occupation.

(c) The applicant must respond to the reinstatement offer within 30 days.

2. No offer will be made to reinstate coverage on the RPR, nor will any reinstated or reissued contract contain an RPR.

3. Any RPR policyowner who accepted the July 9, 1974, offer of UNAC and desires reinstatement of coverage must repay to UNAC the excess of the amount received by him pursuant to the offer over the amount to which he would be entitled under Part IV(B) if payments under Part IV(B) were made to persons accepting the July 9, 1974, offer.

V. *Method of Determining Liquidated Cash Value.*

A. The figures listed below are based upon financial data at September 30, 1975. Liquidated cash values will be computed as follows:

1.	Assets at Book Value per UNAC's September 30, 1975, Financial Statements		$31,171,988
2.	Adjustments to Assets		
	(a) Policy Loans on Life Policies Netted by Reduction of Life Policy Liabilities	$ 960,974	
	(b) Litigation Expenses	1,000,000	(1,960,974)
3.	Liability Items		
	(a) Advance Premiums	$ 99,422	
	(b) Premium Deposit Funds	2,561	
	(c) Commissions to Agents Due or Accrued	227,471	

(d)	General Expenses, Taxes, etc. Due or Accured	220,946	
(e)	Unearned Investment Income and Unamortized Discount of Interest Sold	683,590	
(f)	Security Fluctuation Reserve	310,610	(1,544,600)
4.	Policyowner Liability Items		
(a)	Active Claims Incurred through September 30, 1975	$13,590,116	
(b)	Refund of RPR premiums from August 5, 1974 through September 30, 1975	2,841,212	
(c)	Statutory Reserves for Continuation of Basic Coverage at September 30, 1975	7,006,819	
(d)	Capital and Surplus for Rehabilitated Company	2,500,000	(25,938,147)
5.	Net Assets at *Book Value* Available for Payment to RPR policyowners		$ 1,728,267
6.	Asset Market Value Adjustment Factor		
(a)	Market Value of Assets at September 30, 1975	$25,542,525	
(b)	Book Value of Assets at September 30, 1975	31,171,988	
(c)	Adjustment factor (a) ÷ (b) =	81.94%	
7.	Market Value of Assets Available for payment to RPR policyowners Line 5 x 6c	$ 1,416,142	
8.	RPR Premiums Paid through August 4, 1974, on policies in force at August 5, 1974 (converted to U.S. dollars)	9,031,622	
9.	Liquidation Percentage to RPR policyowners at August 4, 1974 Line 7 ÷ 8	15.68%	

B. The liquidated cash value for each individual policy is to be determined as follows:

1. Separate all policies in force at September 30, 1975, into basic coverage form and calendar year of issue.

2. For each of the groups determine the total active life reserve as of September 30, 1975, and the annual premium excluding RPR premiums for the policy year ending next following September 30, 1975.

3. The total liquidated cash value for each group will be the total active life reserve for that group, multiplied by the asset market value adjustment factor of 81.94%.

4. For each of the groups determine the liquidation premium percentage which is the total liquidated cash value for each group divided by the total annual premiums for that group.

5. For each policy the liquidated cash value equals the liquidation premium percentage in paragraph 4 determined for that group to which that policy belongs multiplied by the annual premium for the current year excluding RPR premiums paid.

6. For RPR benefits, the liquidated cash value will be RPR premiums paid to UNAC subsequent to August 4, 1974, plus an amount equal to 15.68% of the RPR premiums paid through August 4, 1974.

VI. *Disposition of Policy Claims for Accident or Health Benefits.*

Claim provisions concerning basic coverage are not affected by the Rehabilitation Plan. Once the

policyowner elects to receive the liquidated cash value of his policy, such election will be irrevocable and UNAC will be under no further obligation for claim liability. If no election has been made as of the effective date of the Rehabilitation Plan, no claim will be honored until such election has been made.

VII. *Agent's Commissions.*

A. Current UNAC agent and agency contracts vary substantially with respect to commission rates and vesting privileges. Certain provisions, however, are applicable to all contracts:

1. Each agent or agency contract requires a specified minimum of in force, annualized premium for continued commission payments.

2. Each contract provides for the payment of service fees of 3% to 5% after ten years of policy premium payments.

3. Each contract has had a specific vesting privilege for continuing commission payments based on in force annualized premium and length of active service as an agent.

B. The following changes, applicable to commission payments after the effective date of the Rehabilitation Plan, as determined by the Rehabilitation Court, will result in substantial savings for UNAC:

1. All commissions payable will be limited to the first ten years of premium payments unless vesting privileges are terminated earlier based on the the individual agency contract.

2. No commission will be paid on any future premium increases on individual policies.

3. Future premium increases on individual policies will not be credited to an agent's in

force account for purposes of determining his qualification under Part A(1) above.

VIII. *Structural Changes in UNAC.*

A. The total stock of UNAC is presently held by International. As long as the Limited RPR obligations described in Part XI are outstanding, all of UNAC's common shares will be placed in a voting trust in the form attached as Exhibit B to the Order Approving Plan of Rehabilitation and Settlement of Claims and Litigation of the Rehabilitation Court.

B. The Department may maintain a representative at UNAC's office for two years or such additional period as the Department deems advisable. That representative will have the right to attend all Board and Committee meetings and will receive advance notice of the agenda of those meetings.

C. New management will be selected consistent with guidelines to be promulgated by the Department. No person active in UNAC's management prior to rehabilitation will be employed except those persons who have been retained to date by the Department who may, but are not required to, be retained in the future. Specifically, any employment contract entered into between UNAC and any of its officers, directors and employees prior to rehabilitation shall be null, void and of no effect.

IX. *Third Party Recoveries.*

On December 2, 1975, the Department as Rehabilitator of UNAC filed a complaint in the Superior Court of Marion County, Indiana, against certain defendants for the enforcement of rights vested in UNAC. The defendants include the officers and directors of UNAC from 1969 through 1974;

Charles M. Beardsley and Booke and Company, former consulting actuaries of UNAC; and Ernst and Ernst, former auditors of UNAC. The theories of the complaint are breach of contract and negligence. Also filing similar claims against the defendants were certain UNAC policyowners on their own behalf and on behalf of a class consisting of all policyowners who hold now or have held contracts of insurance with INAC. The venue of the lawsuit was changed to the Superior Court of Hamilton County, Indiana.

Any recovery from the defendants in the lawsuit now pending in the Superior Court of Hamilton County or any other recovery as a result of legal action or claims by the Department or UNAC after rehabilitation as based on liability incurred for acts or omissions prior to rehabilitation shall inure to the benefit of RPR policyowners as of August 4, 1974, in proportion to their payments under Part IV(B). UNAC will maintain a list of those policyowners until all litigation has been concluded and all recoveries, less litigation costs, have been distributed to the policyowners.

Neither the lawsuit not pending in the Superior Court of Hamilton County nor any other legal action or claims by the Department or UNAC after rehabilitation as based on liability incurred for acts or omissions prior to rehabilitation shall be settled or dismissed without the prior written approval of the Department and the Rehabilitation Court.

X. *Contingent Liabilities.*

A. *Guarantee Reserve Life Insurance Company.*

UNAC purchased certain policies, principally RPR policies, from Guarantee Reserve Life Insurance Company in 1968. Guarantee contends

that it has no further liability to those policyowners. However, should there be any such liability, Guarantee has indicated that it seeks indemnity from UNAC. Guarantee also asserts rights to indemnity for its cost of defense. These policies are hereby treated in the same manner as those policies issued directly by UNAC, both classes of which have been represented by counsel herein. UNAC shall have no further obligation or liability to Guarantee.

B. *Cal-Lind Funding Corporation.*

Cal-Lind Funding Corporation has made two claims against UNAC based on three agreements between UNAC and Cal-Lind of California, a subsidiary of Cal-Lind Funding Corporation. Cal-Lind claims unearned premiums in the sum of $61,725.09 and loans in default in the sum of $86,845.97 stemming from the agreements. The Department denies the claims, asserting invalid execution and that UNAC did not have legal authority to make such agreement. The claims and defenses were tried by the Court. The Court finds:

1. All transactions and dealings between Cal-Lind, or its subsidiary and UNAC were fair, reasonable, beneficial to UNAC, and its agents, employees and policyholders, and were fully and publicly disclosed.

2. There was no unlawful self-dealing between Cal-Lind and UNAC with respect to these transactions.

3. Pursuant to contract, loans are in default resulting in unearned premiums being owned by UNAC to Cal-Lind and its subsidiary in the sum of $61,724.00.

4. Pursuant to contract, loans are in default from employees and agents of UNAC, resulting in guarantees being owed by UNAC to Cal-Lind and it's subsidiary in the sum of $80,589.00.

5. The service agreement between UNAC and Cal-Lind was fair and reasonable and UNAC is not entitled to a set-off in these proceedings. Therefore, Cal-Lind Funding Corporation is granted judgment against UNAC in the amount of $142,313, each party to bear its own costs; and further that execution of said judgment is hereby abated until January 1, 1978; or as the Department and UNAC may deem payable in part or in full prior to that date.

C. *Guaranty Associations.*

On August 4, 1974, UNAC was licensed to do business in states which either had at that time or have subsequently enacted legislation providing for some form of life and/or health insurance guaranty association. While the legislation in each state differs particularly as to its applicability, the general purpose of such legislation is to protect the state's policyowners, subject to certain limitations, against failure in performance of contractual obligations due to the impairment of the insurer. To provide that protection, an association of insurers is created to ensure the payment of policy benefits and of continuation of coverages, and members of the association are subject to assessment to provide funds to carry out that purpose.

The Rehabilitator understands that the guaranty associations in the eight states of Connecticut, Kansas, Montana, Nevada, New Hampshire, North Carolina, South Carolina and Vermont

may have certain obligations to UNAC policyowners residing in their respective states on August 5, 1974. To the extent that any guaranty association as a result of the rehabilitation proceeding, makes a payment to or on behalf of a UNAC policyowner, that policyowner's rights under the UNAC policy shall be deemed to be assigned to the guaranty association until such time as the guaranty association has been fully reimbursed. UNAC shall have no further obligation or liability to any guaranty association, other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however*, if any guaranty association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing provisions, that association shall receive from UNAC each year until fully reimbursed a portion of UNAC's statutory net gain from operations after dividends to policyowners, federal income taxes and the payments to be made under Part XI, equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for basic coverage of UNAC on August 5, 1974.

D. *Other Contingent Liabilities.*

1. Airline Pilots Insurance Agency, Inc., a former sales agent of UNAC, has been granted leave to intervene in the rehabilitation proceeding. Thomas R. McGeoghegan, on behalf of himself and all other managers and supervisors and agents of UNAC, has sought leave to intervene in the rehabilitation

proceeding. Part VII. of the Rehabilitation Plan provides for agents' commissions and UNAC shall have no additional liability to Airline Pilots Insurance Agency, Inc., Thomas R. McGeoghegan, or any other manager, supervisor or agent of UNAC, other than the liability described in Part VII.

2. The Rehabilitation Plan deals with the rights and claims of various parties interested in UNAC. Those parties shall have no rights or claims against UNAC other than as provided by the Rehabilitation Plan. As to other parties, if any, whose rights or claims are not recognized by the Department as being valid prior to the effective date of the Rehabilitation Plan, UNAC shall have no liability to said parties. The Department recognizes UNAC's liability to pay for goods and services furnished to UNAC in the course of its business and the rehabilitation.

XI. *Additional Benefits to RPR Policyowners.*

UNAC is a stock company, all of whose shares are owned by International. An initial capital and surplus of $2,500,000 are necessary to give the rehabilitated company an adequate reserve against unforseen contingencies and to give reasonable assurance of UNAC's ability to meet its obligations in the future. No infusion of new capital is believed presently available. Accordingly, the only source of the necessary capital and surplus is reduction of liabilities which, unless accompanied by the extension of a corresponding additional policy benefit, might benefit the shareholders at the expense of the policyowners.

UNAC shall create for the members of the class of RPR policyowners as of August 4, 1974, an additional

policy benefit in the form of a limited return of premium rider ("Limited RPR") in addition to the cash payments described in Part IV. The Limited RPR obligates UNAC to make payments to such policyowners in the aggregate principal amount of $2,500,000, within ten years, together with interest at the rate of 6% per annum. Limited RPR payments will be required upon the expiration of ten years or at any time UNAC has capital and surplus of $4,000,000, but no payment will be made which would reduce the capital and surplus in UNAC below $2,500,000. The payment of the Limited RPR is expected to be dependent on UNAC's ability to generate profits. However, because International will be obliged at the end of the 10-year period to pay UNAC the amount of any Limited RPR payments not yet made, with interest, there also is a possibility of future borrowing or raising of capital by International in order to infuse new capital into UNAC to permit it to make the Limited RPR payments. Alternatively, all or a portion of the pledged UNAC stock might be sold in order to satisfy the Limited RPR benefits. If all Limited RPR payments are not made or otherwise satisfied at the expiration of the 10-year period, UNAC is obligated to cause the formation of a mutual insurance company and merge itself into the mutual company with the voting trustees obligated to vote for the merger.

UNAC shall request a "no action" letter from the Securities and Exchange Commission to the effect that the creation of the Limited RPR is not a transaction subject to registration under the Securities Act of 1933, and the views of the Securities Commissioners of the several states shall also be solicited. If required and feasible, the Limited RPR shall be registered as a security in UNAC's jurisdictions, if any, where it is required.

XII. *Foreign Jurisdictions.*

UNAC has significant numbers of policyowners in Canada and the United Kingdom. The Department will submit the Rehabilitation Plan to foreign regulatory authorities, or take such other steps as the Department deems to be in the best interests of UNAC.

XIII. *Settlement of Litigation.*

A. *Description of Pending Litigation.*

Three policyowner class action lawsuits and one individual policyowner lawsuit, which are similar but not identical, have been filed against UNAC and stayed by the respective courts having jurisdiction. These are the following:

Robert Schultz and All Members of the Class v. Underwriters National Assurance Company, Cause No. 74CH 4659 in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, subsequently removed to federal court, where it is now pending as *Robert Schultz v. Underwriters National Assurance Company,* Civil Action No. 74 C 2550 in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter referred to as the "Chicago case").

B. M. Honeycutt, et al. v. Underwriters National Assurance Company, Civil Action No. 482-74-A in the United States District Court for the Eastern District of Virginia (hereinafter referred to as the "Virginia case").

Charles R. Hall, D.D.S., Richard R. Cannon, D.D.S., P.A. v. Underwriters National Assurance Company, Civil Action No. 75-7-900 in the Circuit Court of Madison County,

Alabama, subsequently removed to federal court, where it is now pending under the same title as Civil Action No. 75-L-1589-NE in the United States District Court for the Northern District of Alabama, Northeastern Division (hereinafter referred to as the "Alabama case").

John Warren Meyer v. Guarantee Reserve Life Insurance Company and Underwriters National Assurance Company, Cause No. 786-532 in the Superior Court of King County, Washington (hereinafter referred to as the "Washington case").

The Chicago and Virginia cases are action on behalf of classes consisting of some or all of the policyowners whose policies include an RPR. The Chicago case seeks an injunction against termination of certain insurance policy provisions, a constructive trust on the assets of UNAC, and punitive damages in the amount of $500,000. The Virginia case seeks damages in the amount of $180 million, punitive damages in the amount of $120 million, specific performance of policy provisions, other equitable relief, costs and attorneys' fees. Both cases, on the Department's motions, were stayed by the respective federal courts in which they are pending. The plaintiffs in both cases have, however, been granted leave to intervene in the Indiana rehabilitation proceeding. The class representative in the Chicago case has filed a complaint in the rehabilitation proceeding generally corresponding to the claim initially asserted. The class representatives in the Virginia case have not filed a complaint in the rehabilitation proceeding. The Chicago and Virginia plaintiffs have been conditionally determined by the Rehabilitation Court to

represent as intervenors the class of all UNAC present and former policyowners.

The Alabama case purports to be an action on behalf of a class consisting of all policyowners in Madison County, Alabama, whose policies include an RPR. Compensatory damages are sought, although the actual amount of those damages was not stated in the complaint. On the Department's motion, the Alabama case was stayed by the federal court and the Alabama plaintiffs have not sought to intervene in the rehabilitation proceeding.

The Washington case is an action by a holder of two policies with RPRs that were originally issued by Guarantee Reserve Life Insurance Company and assumed by UNAC in 1968. The trial court entered judgment in favor of the plaintiff and against Guarantee for $6,317.88, the amount found due under the RPRs. The trial court stayed all proceedings against UNAC by the plaintiff and by Guarantee. The Washington plaintiff has not sought to intervene in the rehabilitation proceeding.

On December 1, 1975, James A. Newpher ("Newpher"), a policyowner of UNAC, filed a petition for intervention in the rehabilitation proceeding asserting that his interests are not represented by the Chicago and Virginia class plaintiffs, stating that he does not desire to be represented by them, and requesting that an investigation be conducted of certain matters in the rehabilitation proceeding. Newpher also asked the Rehabilitation Court to grant various alternative forms of injunctive and monetary relief for the alleged wrongful acts of the Department and others.

B. *Settlement of Asserted and Unasserted Claims.*

In consideration of the provisions of the Rehabilitation Plan, the claims of the UNAC policyowner class representatives are compromised and dismissed. While the Alabama class plaintiffs and the Washington plaintiff have not filed any claim against UNAC in the rehabilitation proceeding, those plaintiffs are members of the policyowner class represented by the intervening Chicago and Virginia class plaintiffs. Whether or not any policyowner is a member of a class pursuant to Trial Rule 23, in order to fix and determine UNAC's obligations after rehabilitation, all claims of UNAC policyowners against UNAC are compromised and dismissed, including the claims of Newpher. The claims of Newpher or any other policyowner against the Department are compromised and dismissed and the Department and its personnel are discharged from any liability for their acts incident to the rehabilitation of UNAC.

Subsequent to the filing of the Department's initial Proposed Rehabilitation Plan for UNAC, certain of the defendants in the lawsuit described in Part IX filed "counterclaims" against UNAC or the Department as Rehabilitator of UNAC for certain actions taken in connection with the rehabilitation of UNAC. Also, International filed suit against the Department as Rehabilitator of UNAC for certain actions taken in connection with the rehabilitation of UNAC. These contentions, to the extent they may be raised by the persons asserting them or any other person, to the extent they are cognizable by any court, and to the extent they concern actions taken in connection with the rehabilitation of UNAC, are

properly determined by the Rehabilitation Court. The Department and its agents and employees are discharged from any liability for such claims.

* * *

[Exhibit B omitted in printing]

10.

[Notices In The Superior Court of Marion County, Indiana, Room No. 5]

[Indiana Department of Insurance Letterhead]

To: All Interested Parties

Re: Underwriters National Assurance Company Rehabilitation

This is to advise you that Judge Michael T. Dugan, II, of the Superior Court of Marion County, Indiana, Room No. 5, issued a final Order regarding the rehabilitation of Underwriters National Assurance Company on November 22, 1976. The final Order approved a Plan of Rehabilitation generally along the lines of the plan sent you earlier this year, with certain variations. The chief variations are: (1) UNAC is ordered to pay in full the claims of creditor Cal-Lind Funding Corporation, (2) the Court will appoint from five to eleven people (Trustees) to represent the diverse groups and interests involved in the rehabilitation of the company and to select a Board of Directors, and (3) the Order acknowledged that certain assets held in Canada and the United Kingdom, will not be available at this time for distribution to policyowners until after, if at all, a clarification is obtained from the United Kingdom and Canadian authorities, and the Order directs UNAC to exclude such assets from UNAC's calculations in determining the amount of distribution to policyowners.

The Court will appoint the Trustees on or before December 22, 1976. The Trustees will select a Board of Directors on or before January 22, 1977. The company will be released from rehabilitation after the new Board of Directors is appointed, allowing the company to resume business operations. The Board of Directors will then select people to manage the ongoing operations of the company. The Order states that the refunds to policyowners provided by the Plan are to be made by management after it is

selected. No time is established for this, but we anticipate it will be well into 1977 before the future management can do all those things necessary to make these refunds. When new management is employed, it will send policyowners: (1) a copy of the final Order and Plan, (2) a data sheet showing their options, liquidated values, RPR refunds, etc., and (3) a form for policyowners to select their desired option under the Plan.

Under the Plan all RPR benefits are to be terminated and refunds made of all RPR premiums collected since August 5, 1974. No further RPR premiums are to be paid by policyowners. All RPR policyowners should be advised that on or before ten years you are entitled to receive your pro rata share of the $2,500,000.00 Limited RPR provided by the Plan, plus 6% interest per annum until paid. If the Limited RPR obligation is not paid when due, the company will be mutualized for the benefit of policyowners. You are also entitled to a pro rata share of any future recovery, if any, from the pending litigation against third parties and a refund of between approximately 7% and approximately 15-½% of the premiums paid for the RPR prior to August 4, 1974. The percentage and timing of the refund will depend on resolution of the situation in the United Kingdom and Canada. Those non-cancellable policyowners who continue to keep insurance on a guaranteed renewable basis with the company are entitled to receive dividends from the company from profits, if any, earned on this business in the future, to the extent that there are future premium increases. Other profits, if any, will be applied to retire the Limited RPR obligation. *In view of the RPR policyowners' and non-cancellable policyowners' rights to these benefits, it is essential that policyowners constantly keep the company advised of any change in mailing address.*

With the exception of the termination of RPR benefits and the conversion of non-cancellable policies to guaranteed renewable policies, no policy benefits are to be

changed. The company has always honored all policy benefits except RPR, and it should be expected to do so in the future.

You should not expect to receive further advise from anyone representing UNAC until new management is employed and has an opportunity to structure and assume its appropriate duties. This should occur within the first quarter of 1977, but may take longer. In the meantime, the Rehabilitation Court will continue to monitor the affairs of the company.

This letter is intended only to give you a general overview of the Court's final Order. A copy of the final Order and the Plan as approved by the Court is available from the Department upon request at $5.00 per copy if you desire a copy prior to the time new management is required to send you one.

Sincerely yours,

H.P. Hudson, Commissioner
Indiana Department of Insurance
As Rehabilitator of Underwriters
National Assurance Company

HPH:jec

To All Members of the Class Composed of Past and Present UNAC Policyholders

As the lead counsel for the Class of Policyholders for UNAC, we are taking this opportunity to share with you the current status of the Court approved Plan of Rehabilitation referred to in Commissioner Hudson's letter, enclosed.

Any plan of rehabilitation is by definition a compromise among conflicting interests. Its purpose is to identify the underlying causes of a company's financial problems, and to establish a new means by which the rehabilitated company can have a reasonable chance for future financial stability and growth, consistent with the basic rights of policyholders and creditors. The Plan of Rehabilitation for UNAC attempts to fit this pattern, and represents the collective effort of a great many people over a two-year period.

The Court approved Plan of Rehabilitation contains several provisions of prime importance and consideration to you, the Policyholder. Principal among these is the continuation of your basic insurance coverage which, if UNAC was forced to liquidate, would be cancelled. In our judgment, that alternative would not be in the best interest of the Policyholders as a group.

The additional financial benefits to Policyholders are fairly outlined in Commissioner Hudson's letter. Among those is the provision that any recoveries obtained in the Hamilton County litigation against certain defendants will enure to the benefit of the Policyholders who held the RPR. We believe that litigation has possibilities for additional recoveries by the RPR policyholders. As yet we are unable to express an opinion as to the likelihood of success in that action, but all efforts will be made on your behalf to prosecute your claims to a successful conclusion.

There are a number of separate provisions in the approved Plan which we, as your attorneys, have opposed

throughout the course of the Rehabilitation proceeding. These provisions could now be the subject of an appeal which we could prosecute on your behalf. However, based upon our analysis of the facts, the applicable law and the practicalities of the situation, it is our considered judgment, and that of a number of the named Policyholders who have undertaken to be representatives of the Class, that any appeal we might take from the Plan would materially delay the Company's rehabilitation under new management and further erode its financial condition. For these reasons, we are presently included to forego an appeal from Judge Dugan's Order and approved Plan.

We would, of course, prefer to communicate with each of you on a personal basis, to answer any questions you might have and to discuss the details of the Plan with you. By virtue of your sheer numbers, that is impossible and is one of the reasons for having class actions. Nonetheless, we and the named representatives of the Class are interested in your thoughts on this matter. We can be reached at the addresses listed below.

Sincerely,

Martin A. Smith, Esq.
Stephen P. Carponelli, Esq.
Jeffrey M. Goldberg, Esq.
10 South LaSalle Street
Chicago, Illinois 60603

Richard H. Jones, Esq.
John E. Fricker, Esq.
2054 N. 14th Street
Arlington, Virginia 22201

John J. Dillon, Esq.
Gregory F. Hahn, Esq.
120 E. Market Street
Suite 511
Indianapolis, Indiana 46204

Attorneys for UNAC Policyholder Class

11.

[In the Superior Court of Marion County, Indiana, Room No. 5]

[Title omitted in printing]

FILED JUNE 8, 1977

PETITION FOR INSTRUCTIONS CONCERNING A SERVICE CONTRACT BETWEEN UNDERWRITERS NATIONAL ASSURANCE COMPANY AND EACH OF THE STATE INSURANCE GUARANTY ASSOCIATIONS

Underwriters National Assurance Company ("Company") and the insurance guaranty associations in the states of Connecticut, Kansas, Montana, Nevada, New Hampshire, North Carolina, South Carolina and Vermont, which are parties herein ("Guaranty Associations"), jointly petition the Court for instructions concerning the execution of a Service Contract as directed by the Court's Entry of April 20, 1977. Pursuant to part X(C) of the Plan of Rehabilitation approved by the Court on November 22, 1976, and the Court's Entry of April 20, 1977, the Company and the Guaranty Associations have now negotiated a Service Contract acceptable to them, a copy of which is attached hereto as Exhibit A.

WHEREFORE, the Company and the Guaranty Associations ask the Court to enter an Order authorizing and directing the Company and each of the Guaranty Associations to execute a Service Contract in substantially the form attached hereto as Exhibit A and to do all acts

reasonably necessary or appropriate to implement and carry out the Service Contract.

Respectfully submitted,

BAKER & DANIELS

By /s/ Theodore R. Boehm

/s/ Charles T. Richardson

Attorneys for Underwriters National Assurance Company

810 Fletcher Trust Building
Indianapolis, Indiana 46204
317/636-4535

KIGHTLINGER, YOUNG, GRAY & DETRUDE

By /s/ Mark W. Gray

/s/ Donald L. Dawson

151 North Delaware Street
Suite 660
Indianapolis, Indiana 46204
317/638-4521

Attorneys for Connecticut Life and Health Insurance Guaranty Association, Kansas Life and Health Insurance Guaranty Association, Montana Life and Health Insurance Guaranty Association, Nevada Life and Health Insurance Guaranty Association, New Hampshire Life and Health Insurance Guaranty Association, North Carolina Life and Accident and Health Guaranty Association, South Carolina Life and Health Insurance Guaranty Association and Vermont Life and Health Guaranty Insurance Association

[Certificate of service omitted in printing]

SERVICE CONTRACT

THIS AGREEMENT, executed at Indianapolis, Indiana, this ____ day of _____, 1977, by and between Underwriters National Assurance Company, an Indiana insurance corporation ("Underwriters"), and _____, organized under the law of _____ (the "Guaranty Association"),

WITNESSES:

Recitals

A. On August 5, 1974, the Superior Court of Marion County, Indiana, Room No. 5 ("Rehabilitation Court"), entered an Order of Rehabilitation pursuant to the law of the State of Indiana concerning the affairs of Underwriters in Cause No. S574-851;

B. On November 22, 1976, the Rehabilitation Court entered a final Order and approved a Plan of Rehabilitation for Underwriters, copies of which are attached hereto and incorporated herein;

C. The Plan of Rehabilitation makes certain changes in the insurance policies issued by Underwriters to its policyowners prior to August 5, 1974, among which changes are the following:

1. Certain of the policyowners have heretofore had non-cancellable insurance policies which provide, in effect, that there can be no increase of premium on the policy during the term of the policy. The Plan of Rehabilitation changes the non-cancellable insurance policies to guaranteed renewable policies in which there is a probability that there will be a premium increase based upon experience by class.

2. Certain of the policyowners have heretofore had insurance policies with a Return of Premium Rider

("RPR") attached, promising a return of a portion of the paid premiums if certain conditions set forth in the policy are met. The Plan of Rehabilitation terminates all obligations of Underwriters under the RPR; and

D. The Guaranty Association has informed Underwriters that, pursuant to the law of _____, the Guaranty Association is required in certain instances to guarantee to policyowners who qualify their rights to the enforcement of a non-cancellable insurance policy and to the enforcement of an RPR; and

E. It is in the best interests of the policyowners whose rights are guaranteed by the Guaranty Association for there to be continuity in the servicing of the insurance policies issued by Underwriters; and

F. Under the Plan of Rehabilitation, Underwriters will continue as a rehabilitated insurance company and will service its insurance policies, as changed and modified, pursuant to the final Order and Plan of Rehabilitation;

Agreement

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties agree as follows:

1. *Servicing of Policies.* Underwriters will continue to service its insurance policies which are guaranteed by the Guaranty Association in the same manner as it services its insurance policies not so guaranteed. All billing for premiums, all collection of premiums and the payment of all claims, except RPR claims, arising under policies which are guaranteed by the Guaranty Association will be made by Underwriters. Underwriters will maintain adequate records in order to determine the status of all insurance policies which are guaranteed by the Guaranty Association and to provide information to the Guaranty Association to the extent required for the performance of the Guaranty Association's obligations hereunder. Not later than 60 days

after the last date for election by policyowners under Underwriters' notice provided by paragraph (4) of the final Order, the Guaranty Association will certify to Underwriters a list of those policies which are guaranteed by the Guaranty Association. The parties understand that the list may need to be amended in individual cases thereafter.

2. *Premium Increases on Previously Non-Cancellable Policies.* In the event that an increase in premium for basic insurance coverage above the premium which could have been charged by Underwriters for the same coverage as the policy was written on August 5, 1974, is applicable to any policy which was previously a non-cancellable policy, and which the Guaranty Association has certified to Underwriters as being guaranteed by the Guaranty Association, Underwriters will keep a separate record of the amount and date of the premium increase. Underwriters will continue to bill the policyowner at the premium which could have been charged by Underwriters for the same coverage as the policy was written on August 5, 1974, and will bill the Guaranty Association for the amount of the premium increase. The Guaranty Association will pay to Underwriters the amount of the premium increase and Underwriters will continue the basic insurance coverage of the policyowner as if all of the premium had in fact been paid by the policyowner.

3. *Return of Premium Rider ("RPR").* If any policyowner with a policy having an RPR which the Guaranty Association has certified to Underwriters as being guaranteed by the Guaranty Association desires to continue to carry the RPR and pay the premium which could have been charged by Underwriters for the same coverage as the policy was written on August 5, 1974, for the RPR, Underwriters will collect the premium for the RPR from the policyowner and will remit said funds quarter to the Guaranty Association. In the event the RPR matures, the benefits payable under the RPR will be paid

by the Guaranty Association, not by Underwriters. Underwriters will provide the Guaranty Association with all statistical data necessary to determine the amount and eligibility of the policyowner for RPR benefits within 15 days after the RPR has matured.

4. *Assignments.* The Plan of Rehabilitation provides for the exercise of certain options by policyowners. The Guaranty Association will require a written acknowledgment in certain instances of an assignment to the Guaranty Association by a policyowner whose rights are guaranteed by the Guaranty Association of all the policyowner's rights under the Plan of Rehabilitation. The Guaranty Association will supply each assignment to Underwriters. Underwriters will recognize any such assignment, as well as the assignments provided by part X(C) of the Plan of Rehabilitation, as valid and will make payments of any funds payable to an assigning policyowner under the Plan of Rehabilitation to the Guaranty Association pursuant to the terms of the assignment.

5. *Service Fee.* In return for its services as set out in this Service Contract, Underwriters will be paid by the Guaranty Association a service fee in the amount of the cost to Underwriters of rendering the service, computed according to generally accepted accounting principles as determined from time to time by Underwriters' independent auditors. In the event Underwriters' independent auditors decided that the expense of determining such cost is excessive in relation to such cost, the auditors may in their best judgment from time to time fix a reasonable approximation of such cost which shall be conclusive on the parties, unless the parties negotiate a service fee. In addition, and as a part of the service fee, the Guaranty Association agrees to indemnify and save Underwriters harmless from and against all claims, losses, damages, liabilities, costs, expenses and attorneys' fees arising out of this Service Contract, except in cases of independent acts of negligence or willful misconduct by Underwriters' employees.

6. *Payment of Service Fee and Other Monies.* Except as provided hereafter, all funds due the Guaranty Association by Underwriters shall be mailed quarterly to the Guaranty Association at such office and address as the Guaranty Association shall from time to time direct in writing. Underwriters shall prepare an invoice for each fiscal quarter of Underwriters list and describing in reasonable detail the service fee owed by the Guaranty Association under paragraph 5 of the Service Contract for the past quarter and other monies due Underwriters under this Service Contract. All funds due Underwriters by the Guaranty Association shall be mailed directly to Underwriters within thirty days after the Guaranty Association receives an invoice therefor. Monies paid by the policyowner to preserve his rights under the RPR are not a premium for coverage but are a deposit to preserve the rights of the policyowner under the Guaranty Association's enabling statute. The Guaranty Association is not an insurer but is a guarantor only. If, as of any December 31, the sum of all payments by the Guaranty Association to or on behalf of policyowners are in excess of the sum of all payments to the Guaranty Association by Underwriters under this Service Contract, Underwriters shall mail to the Guaranty Association at such office and address as the Guaranty Association shall from time to time direct in writing and on or before the March 31 immediately following that December 31, and each March 31 thereafter until the excess has been fully reimbursed, a portion of Underwriters' statutory net gain from operations for the year ended on that December 31 after dividends to policyowners, federal income taxes and the payment to be made under part XI of the Plan of coverage on August 5, 1974, divided by the total annual premiums in force for basic coverage of Underwriters on August 5, 1974.

7. *Audit.* The Guaranty Association is entitled to require an audit at its expense at any reasonable time to review all payments and receipts contemplated by this Service Contract.

8. *Agents' Commissions.* No agents' commissions shall be paid or charged on any amount collected by Underwriters and paid to the Guaranty Association on account of RPRs. No agents' commissions shall be paid or charged on any amount paid to Underwriters by the Guaranty Association on account of any premium increase on previously non-cancellable policies.

9. *Successors and Assigns.* This Service Contract shall be binding upon the successors and assigns of the parties.

10. *Termination.* This Service Contract shall remain in force so long as the liability of the Guaranty Association continues. However, the parties may terminate the Service Contract by mutual agreement at any time, and either party may terminate the Service Contract upon six months' written notice of termination to the other party.

11. *Jurisdiction of the Rehabilitation Court.* It is clearly understood by the parties that Underwriters, the Guaranty Association and this Service Contract are subject to the continuing jurisdiction of the Rehabilitation Court in certain respects under the final Order and the Plan of Rehabilitation.

12. *General Conditions.* This Service Contract is executed under and shall be construed in accordance with the laws of the State of Indiana. No waiver of any term or condition of this Service Contract or of any breach of this Service Contract shall be deemed or construed as a waiver of any other term, condition, or breach, or of a subsequent breach of the same term or condition. This Service Contract constitutes the entire agreement between the parties hereto, and there are no representations, terms, conditions or agreements in respect of the same subject matter, with the exception of the final Order, the Plan of Rehabilitation, including part X(C) thereof, and the other orders of the Rehabilitation Court.

IN WITNESS WHEREOF, the parties have caused this Service Contract to be executed on the day and in the year first above written.

UNDERWRITERS NATIONAL ASSURANCE COMPANY

By _____
President
"Underwriters"

Attest:

_____

_____
"Guaranty Association"

Attest:

_____

12.

NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION

78CV 174

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, *Plaintiff* VS. UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA *Defendants*	**COMPLAINT** FILED January 12, 1978

Plaintiff, complaining of Defendants, alleges and says:

AS TO AND FOR THE COURT'S JURISDICTION:

1. This action is commenced under the provisions of the Declaratory Judgment Act, G.S. §§1-253, *et. seq.*, under the North Carolina Life and Accident and Health Insurance Guaranty Association Act, G.S. §§58-155.65, *et. seq.*, and under certain other provisions of the Insurance Law, G.S. §§58-182—58-188.8, regarding deposits by insurance companies. Plaintiff's claims for relief are for declaratory and other proper relief thereunder. Plaintiff's claims relate to, among other things, personal property in this state consisting of deposits by an insurance company, as

hereinafter alleged. Defendants have or claim interests therein, and the relief demanded consists partially in excluding one Defendant from any interests therein. The Court has personal jurisdiction under G.S. §1-75.3 and jurisdiction in rem or quasi in rem under G.S. §1-75.8.

2. Plaintiff, the North Carolina Life and Accident and Health Insurance Guaranty Association ("Association"), is a non-profit unincorporated legal entity organized under the law of the State of North Carolina having its principal office in Raleigh, North Carolina, and as such has the capacity to sue in its own name in North Carolina.

3. Defendant Underwriters National Assurance Company ("UNAC") is an Indiana insurance corporation that transacted the business of insurance in North Carolina, and has or claims an interest in personal property in this State, as hereinafter alleged.

4. Defendant John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner"), is the duly elected Commissioner of Insurance of the State of North Carolina.

5. Defendant Harlan E. Boyles, Treasurer of the State of North Carolina ("Treasurer"), is the duly elected Treasurer of the State of North Carolina.

FOR A FIRST CLAIM FOR RELIEF:

6. Article 17C, Chapter 58 of the General Statutes of North Carolina, known as the "North Carolina Life and Accident and Health Insurance Guaranty Association Act," G.S. §§58-155.65 *et. seq.*, was enacted, ratified, and effective at all times relevant to this action. Among other things, the effects of the Act are (a) to state the purpose of the Act as being to maintain public confidence in the promises of insurers and, among other things, to provide a mechanism for the payment of covered claims under certain insurance policies, (b) to apply the Act to direct life policies, accident and health insurance policies, and other

insurance policies, (c) to provide that the Act shall be liberally construed to effect its purpose, (d) to create the Association, (e) to provide the Association with certain powers and duties which include, among others, enumerated powers and duties regarding a foreign insurer that is an impaired insurer under an order of liquidation, rehabilitation, or conservation as defined in the Act, and which powers and duties include provision that the Association shall have standing to appear before any Court in this State with jurisdiction over an impaired insurer concerning which the Association is or may become obligated under the Act, and (f) to provide for enumerated duties and powers of the Commissioner.

7. Plaintiff is informed and believes, and so alleges, that UNAC is a corporation organized under the law of the State of Indiana, was authorized to transact in North Carolina the business of writing insurance including direct life policies, accident and health policies, and other insurance policies, and did write such policies of insurance in North Carolina.

8. Plaintiff is informed and believes, and so alleges, that UNAC deposited with the Commissioner securities having the total face value of $100,000 for the sole protection of North Carolina policyholders of UNAC, and that the said securities so placed on deposit with the Commissioner are registered in the name of the Treasurer of the State of North Carolina in trust pursuant to the provisions of Article 20, Chapter 58, of the General Statutes of North Carolina.

9. Plaintiff is informed and believes, and so alleges, that the Commissioner has determined that UNAC is unable to fulfill its contractual obligations and that, within the meaning of the Act, UNAC is an impaired insurer under an order of rehabilitation.

10. Pursuant to its powers and duties under the Act, the Association is assuring payment of the contractual

obligations of UNAC to residents of North Carolina. The Association has the right, by subrogation and otherwise, to have the Commissioner sell and transfer the said securities for the protection of North Carolina policyholders and to have the said deposits applied to the payment of the contractual obligations of UNAC to residents of North Carolina.

11. An actual controversy exists as to the duties and powers of the Association and as to its rights to have the said deposits and securities applied to the payment of the contractual obligations of UNAC to residents of North Carolina.

AND FOR A SECOND CLAIM FOR RELIEF:

12. Plaintiff realleges Paragraphs 1-11 with the same force and effect as if set forth herein.

13. Pursuant to the provisions of a section of the Act, namely G.S. §58-155.72(8), the Association has standing to appear before this Court, and such standing shall extend to all matters germane to the powers and duties of the Association.

WHEREFORE, Plaintiff prays:

1. That the Court enter a judgment declaring the Association's powers and duties.

2. That the Court enter a judgment declaring the Association's right to have the said deposits and securities applied to the payment of the contractual obligations of UNAC to residents of North Carolina.

3. That the Court enter a judgment excluding UNAC from any interest in the said deposits and securities, except an interest in such sums as remain after the sale thereof and application of the proceeds thereof to payment of the contractual obligations of UNAC to residents of North Carolina.

4. That the Court enter a judgment providing for its retention of jurisdiction and for granting such further,

supplemental relief based on the declaratory judgment herein prayed, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Association under the Act.

5. For such further relief as the Court may deem just and proper.

ALLEN, STEED and ALLEN, P.A.

By: /s/ Arch T. Allen, III

Attorneys for Plaintiff, North Carolina Life and Accident and Health Insurance Guaranty Association

13.

[In The North Carolina General Court of Justice, Superior Court Division, Wake County]

[Title omitted in printing]

ANSWER (Filed March 14, 1978)

Underwriters National Assurance Company, defendant, answering the Complaint, alleges:

1. That paragraphs 1, 2, 3, 4, and 5 of the Complaint are not denied.

2. That paragraph 6 of the Complaint refers to provisions of the General Statutes of North Carolina which speak for themselves, or are subject to interpretation by the court. Therefore, defendant denies the purported interpretation contained in paragraph 6 of the Complaint.

3. Paragraph 7 of the Complaint is admitted.

4. That is is admitted that this answering defendant has deposited securities having the total face value of $100,000.00 with the Commissioner of Insurance of North Carolina as a prerequisite for doing business in the state. That the remaining allegations of paragraph 8 are denied.

5. Paragraphs 9, 10 and 11 of the Complaint are denied.

6. Answering paragraph 12 of the Complaint, defendant restates its answers to paragraph 1 through 11 of this Answer.

7. Paragraph 13 of the Complaint is denied.

FIRST DEFENSE

That the Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

1. That this Court does not have jurisdiction in the subject matter for the reason that there is a prior action pending in the Superior Court of Marion County, Indiana, Cause No. S574-851, in an action entitled "Department of Insurance, State of Indiana, Petitioner vs. Underwriters National Assurance Company, Respondent", wherein said Court is supervising the Rehabilitation of Underwriters National Assurance Company and in such capacity has complete control of and supervision over all the assets of Underwriters National Assurance Company.

2. That security deposits held in trust are property items and assets of Underwriters National Assurance Company regardless of where situated and how held, and as such are subject to the control, supervision and jurisdiction of the Superior Court of Marion County, Indiana, in the action referred to hereinabove which is still pending in said Court.

3. That in the action pending in the Superior Court of Marion County, Indiana, referred to hereinabove, the plaintiff in this action is a party and is represented by Mark W. Gray and Donald L. Dawson of the law firm of Kightlinger, Young, Gray & DeTrude, 151 North Delaware Street, Suite 660, Indianapolis, Indiana, 46204, who are attorneys of record for the plaintiff in said action.

4. That a Plan of Rehabilitation and Settlement of Claims and Litigation was approved in the Superior Court of Marion County, Indiana, by Order and memorandum dated November 22, 1976, and is still in effect and subject to further orders of the Court. A certified copy of the Order and Memorandum Approving Plan of Rehabilitation and Settlement of Claims and Litigation entered by the Honorable Michael T. Dugan, II, Judge of the Marion County Superior Court, dated November 22, 1976 is attached hereto as Exhibit No. 1.

5. That this Court is obligated, pursuant to the provisions of Article IV of the United States Constitution, to give full faith and credit to the public acts, records and judicial proceedings of every other state. Therefore, jurisdiction over the parties and the subject matter of the subject action having been assumed by the courts of the State of Indiana, this Court has no jurisdiction or authority to proceed further in this action.

THIRD DEFENSE

That plaintiff has appeared voluntarily in the action referred to hereinabove thereby subjecting itself to the jurisdiction of the Superior Court of Marion County, Indiana. That by such appearance, plaintiff has waived its right to litigate any and all matters involving its relationship with, and matured or potential claims against defendant Underwriters National Assurance Company by means of collateral attack in the courts of North Carolina or elsewhere.

FOURTH DEFENSE

That by its appearance in the action pending in the Superior Court of Marion County, Indiana, plaintiff has acknowledged and acceded to the jurisdiction of said Court and its actions with respect to the property items and assets of defendant Underwriters National Assurance Company, and plaintiff is thereby estopped from attacking the jurisdiction, orders, and other actions of said Court and proceeding against this defendant in this action.

FIFTH DEFENSE

That the orders and proceedings in the Superior Court of Marion County, Indiana, involving the rights, claims and liabilities between plaintiff and defendant Underwriters National Assurance Company are *res judicata* as to all matters set forth in the complaint filed in this action. Specifically, the November 22, 1976 Order, attached hereto as Exhibit 1, sets forth in detail the method of

reimbursement for amounts paid by plaintiff on account of claims against defendant Underwriters National Assurance Company and plaintiff, as a party to said rehabilitation action in the Superior Court of Marion County, Indiana, is bound by said Order.

FOR A COUNTERCLAIM AGAINST PLAINTIFF, DEFENDANT UNDERWRITERS NATIONAL ASSURANCE COMPANY ALLEGES:

1. That plaintiff is not only a party to, but has and is actively participating in the action still pending in the Superior Court of Marion County, Indiana, referred to hereinabove, which said action is still open for supervision by the Court and further orders affecting the property and assets of this defendant.

2. That the Superior Court of Marion County, Indiana, is a Court of general jurisdiction, fully capable of granting any and all relief available to the plaintiff by reason of the matters and things stated in the Complaint, all of which was known to the plaintiff prior to the commencement of this action.

3. That the commencement of this action in the Superior Court of Wake County, North Carolina by plaintiff is a frivolous duplication intended for the purpose of harrassing this defendant and improperly attempting to interfere with the assets of Underwriters National Assurance Company which are subject to the jurisdiction, supervision and control of the Superior Court of Marion County, Indiana, in the proceeding therein pending.

4. That by reason of the frivolous and improper acts of plaintiff in commencing this action in the Wake County Superior Court, Underwriters National Assurance Company has been damaged by having to incur legal and administrative costs in defending the same and is entitled to recover such damages from the plaintiff in an amount to be determined by the Court.

WHEREFORE, having fully answered the Complaint, defendant Underwriters National Assurance Company prays the Court:

1. That plaintiff's action be dismissed.

2. That defendant Underwriters National Assurance Company recover from the plaintiff damages incurred by reason of the frivolous and improper acts of the plaintiff in commencing this action.

3. That the costs of this action be taxed against the plaintiff.

PURRINGTON, HATCH & McNAMARA, P.A.

/s/ A.L. Purrington, III

/s/ Edwin B. Hatch
605 Raleigh Building
P.O. Box 831
Raleigh, NC 27602
Telephone: (919) 828-7214

[Exhibit 1 omitted in printing]

14.

[In the Superior Court of Marion County, Indiana, Room No. 5]

[Title omitted in printing]

FILED JULY 13, 1978

PETITION FOR INSTRUCTIONS BY UNDERWRITERS NATIONAL ASSURANCE COMPANY

Underwriters National Assurance Company ("Underwriters") petitions the Court for instructions concerning: (1) the Return of Premium Rider ("RPR") death claim of the estate of United Kingdom policyowner George J. Kingsley; (2) the handling of funds received as a result of third party recoveries under part IX of the Plan of Rehabilitation ("Plan"); (3) the impact of the lawsuit filed against Underwriters by the North Carolina Life and Accident and Health Insurance Guaranty Association ("North Carolina Association") upon the obligations of Underwriters and of the North Carolina Association under the Court-approved contract between Underwriters and the North Carolina Association and under the orders of this Court; and (4) the requests received by Underwriters from various state insurance departments for a court order stating that the rehabilitation proceeding was terminated as of a certain date. Underwriters files this petition pursuant to paragraph (10) of the Court's final Order, dated November 22, 1976, which says in relevant part:

> "***The Court shall retain jurisdiction over the parties and over this rehabilitation proceeding on petition of any interested party or the Indiana Department of Insurance (a) to resolve all questions as to interpretation and implementation of the Plan and as to the application of the Plan to specific facts and

circumstances and (b) to modify, amend or supplement the Plan in any respect in the light of future developments. The Court shall also retain jurisdiction over the parties and over this rehabilitation proceeding during the implementation of the Plan to the extent necessary or appropriate to assure compliance with the provisions of the Plan and the Voting Trust and Depositary Agreement and to resolve all questions in that respect.***"

I

The RPR Claim of George J. Kingsley

1. The Plan and the Court's final Order make certain reductions in the amounts payable by Underwriters on account of any RPR on any policy written prior to rehabilitation. Generally, all RPR benefits are terminated (part III of the Plan) and RPR policyowners as of August 4, 1974, receive the RPR liquidated cash value (part IV), a Limited RPR (part XI), and a proportionate share of third party recoveries (part IX).

2. Part XII of the Plan says:

"UNAC has significant numbers of policyowners in Canada and the United Kingdom. The Department will submit the Rehabilitation Plan to foreign regulatory authorities, or take such other steps as the Department deems to be in the best interests of UNAC."

Paragraph (5) of the final Order says:

"UNAC and the Rehabilitator are authorized and directed to do all acts necessary or appropriate to cause to be implemented the provisions of the Plan and the Voting Trust and Depositary Agreement subject to the approval of the Court. To the extent that any provision of the Plan cannot be fully implemented because of the lack of approval of regulatory authorities in Canada or the United Kingdom, UNAC and the Rehabilitator are authorized and directed to

implement the provision to the extent possible at the time of termination of this rehabilitation proceeding. Without limiting the generality of the proceding sentence, UNAC is authorized and directed to make distributions under the Plan of liquidated cash values, after termination of this rehabilitation proceeding, based upon calculations which exclude from the assets of UNAC the fair market value in exchange dollars of assets on deposit in Canada and the United Kingdom. If UNAC believes that such distributions to policyowners in the United States or in Canada or in the United Kingdom should not be made until approval of regulatory authorities in Canada or the United Kingdom or until other provision is made for policies of Canadian or United Kingdom policyowners, then UNAC shall petition the Court for authority to delay such distributions."

3. On June 8, 1977, Underwriters filed with the Court a Petition for Instructions Concerning the Mailings Required by the Court's Final Order. As a part of that petition, Underwriters asked the Court to approve distributions under the Plan of liquidated cash values to United States and Canadian policyowners based upon calculations which excluded from the assets of Underwriters the fair market value in exchange dollars of assets on deposit in the United Kingdom. By Order dated June 14, 1977, the Court approved Underwriters' request. Subsequently, and as described in the Certificate of Compliance with Orders Concerning Mailing of the Final Order and Plan of Rehabilitation, filed on January 25, 1978, Underwriters made distributions under the Plan to United States and Canadian policyowners only, not to United Kingdom policyowners.

4. While Underwriters and its legal, accounting and actuarial counsel in the United Kingdom have taken steps toward a resolution of Underwriters' affairs in the United Kingdom, no resolution has as yet been reached and Underwriters does not know at present what the precise

response of United Kingdom regulatory authorities and/or United Kingdom courts will be to implementing the Plan in the United Kingdom. At the present time, Underwriters' actuaries in the United States and in the United Kingdom are attempting to agree on a determination of the "net domestic liabilities" of Underwriters on the United Kingdom policies as written, and that actuarial review should be concluded in 30 days. When it is concluded, Underwriters has been advised by its legal counsel in the United Kingdom that action may be taken in the United Kingdom courts to resolve the outstanding issues as to the future handling of Underwriters' United Kingdom business.

5. On March 13, 1978, United Kingdom policyowner George J. Kingsley died. Mr. Kingsley at the time of his death owned a disability income policy of Underwriters, No. E00970, which had an RPR attached. One of the provisions of the RPR was that upon the insured's death, Underwriters was obligated to pay a certain percentage of the premiums theretofore paid under the policy. If this matured RPR claim were honored, Underwriters would pay as a result of the RPR £1,179,60, or approximately $2250.00.

6. As of June 30, 1978, there were 920 policies in force in the United Kingdom, of which 907 had RPRs. The Kingsley claim is the first matured RPR claim on any policy written in the United Kingdom. Except for RPRs maturing as a result of deaths of the insureds, no other RPR will mature until 1980.

7. Underwriters believes that it should be authorized to pay the RPR claim of Mr. Kingsley's estate, despite the contrary provisions of the Plan, for two basic reasons. First, to refuse payment prior to the time that the Plan has been approved for implementation in the United Kingdom or some other compromise reached, may involve Underwriters in expensive litigation in the United Kingdom prior to the

time that Underwriters' actuarial review of the entire United Kingdom situation is complete. Until Underwriters has been advised by its professional consultants as to the best course of action to follow in the United Kingdom, Underwriters does not want to provoke premature Court action against it in the United Kingdom. Second, the cost to Underwriters (and therefore ultimately to its policyowners and shareholder) of opposing the claim would almost certainly be greater than the claim itself, and that cost cannot be justified at this time on the basis of principle. The only way that an existing United Kingdom policyowner could cause an RPR to mature prior to 1980 is for the policyowner to die. Thus Underwriters can pay the Kingsley claim, complete its actuarial and legal review, take appropriate action shortly thereafter based upon that thorough review, and be reasonably confident that the Kingsley payment will not result in a bad precedent in the United Kingdom because of the few RPR's that will mature prior to a final resolution.

WHEREFORE, Underwriters asks the Court to authorize Underwriters to pay the RPR claim of George J. Kingsley under United Kingdom Policy No. E00970 and of any other United Kingdom policyowner who dies prior to resolution of Underwriters' status in the United Kingdom.

II

Third Party Recoveries

8. Part IX of the Plan says in relevant part:

> "Any recovery from the defendants in the lawsuit now pending in the Superior Court of Hamilton County or any other recovery as a result of legal action or claims by the Department or UNAC after rehabilitation as based on liability incurred for acts or omissions prior to rehabilitation shall inure to the benefit of RPR policyowners as of August 4, 1974, in proportion to their payments under Part IV(B). UNAC will

maintain a list of those policyowners until all litigation has been concluded and all recoveries, less litigation costs, have been distributed to the policyowners."

9. Underwriters has incurred to date substantial litigation expenses including court costs and attorneys' fees, as a result of the pursuit of claims against the defendants in the Hamilton County litigation. Underwriters has had to pay those expenses as they were incurred. Underwriters has just received the first settlement recovery from the Hamilton County litigation as a result of the settlements approved by the Court in its Entry dated March 31, 1978, approving a dismissal of claims against certain defendants. The amount of the first settlement recovery is a small percentage of Underwriters' incurred litigation expenses.

10. Underwriters believes that part IX of the Plan should be clarified to permit Underwriters to apply the settlement recovery received as a result of the Court's Entry of March 31, 1978, and all other third party recoveries received hereafter, against Underwriters' incurred litigation expenses, as those recoveries are received by Underwriters. At the point that recoveries exceed incurred litigation expenses, Underwriters believes that the balance at any particular point in time should be retained in Underwriters' corporate account or in short-term securities for ultimate distribution under part IX of the Plan.

WHEREFORE, Underwriters asks the Court to authorize Underwriters to apply all third party recoveries, as received, against litigation costs associated with third party litigation, as incurred, and to retain in Underwriters' corporate account or in short-term securities the difference, if any, between the amount of any recoveries and the amount of incurred litigation costs at any particular point in time.

III

The Lawsuit Against Underwriters By the North Carolina Life and Accident and Health Insurance Guaranty Association

11. Part X(C) of the Plan says:

"On August 4, 1974, UNAC was licensed to do business in states which either had at that time or have subsequently enacted legislation providing for some form of life and/or health insurance guaranty association. While the legislation in each state differs particularly as to its applicability, the general purpose of such legislation is to protect the state's policyowners, subject to certain limitations, against failure in performance of contractual obligations due to the impairment of the insurer. To provide that protection, an association of insurers is created to ensure the payment of policy benefits and of continuation of coverages, and members of the association are subject to assessment to provide funds to carry out that purpose".

"The Rehabilitator understands that the guaranty associations in the eight states of Connecticut, Kansas, Montana, Nevada, New Hampshire, North Carolina, South Carolina and Vermont may have certain obligations to UNAC policyowners residing in their respective states on August 5, 1974. To the extent that any guaranty association, as a result of the rehabilitation proceeding, makes a payment to or on behalf of a UNAC policyowner, that policyowner's rights under the UNAC policy shall be deemed to be assigned to the guaranty association until such time as the guaranty association has been fully reimbursed. UNAC shall have no further obligation or liability to any guaranty association, other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however,* if any guaranty

association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing provisions, that association shall receive from UNAC each year until fully reimbursed a portion of UNAC's statutory net gain from operations after dividends to policyowners, federal income taxes and the payments to be made under Part XI, equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for UNAC basic coverage on August 5, 1974.

12. By the Court's Order of June 14, 1977, Underwriters and the guaranty associations were authorized and directed to execute a Service Contract in substantially the form attached to a joint petition filed by Underwriters and the guaranty associations on June 8, 1977.

13. A copy of the Service Contract between Underwriters and the North Carolina Association is attached hereto as Exhibit A. That Service Contract is identical to all other Service Contracts between Underwriters and the guaranty associations with the exception of the insertion by the North Carolina Association of the last paragraph of the Service Contract on page 8.

14. Prior to executing the Service Contract with the North Carolina Association, Underwriters advised the North Carolina Association in writing that it was Underwriters' understanding that the inserted paragraph on the last page was designed to recite that neither Underwriters nor the North Carolina Association was waiving any claims that it may have in connection with North Carolina deposits and that it was Underwriters' position that the North Carolina Association has no claim to the deposits because of the contrary provisions of the Plan. Underwriters also advised the North Carolina Association that it was Underwriters' understanding that the last paragraph was inserted by the North Carolina Association simply to preserve whatever rights it may have had after

implementation of the Plan and that Underwriters was executing the Service Contract with that understanding.

15. On January 12, 1978, the North Carolina Association sued Underwriters in a North Carolina state court seeking to obtain for the benefit of North Carolina policyowners deposits of Underwriters in North Carolina totalling $100,000. A copy of the complaint is attached hereto as Exhibit B. Underwriters has defended the lawsuit by answering the North Carolina's Association complaint and filing a counterclaim against the North Carolina Association. A copy of Underwriters' answer and counterclaim is attached hereto as Exhibit C. The Commissioner of Insurance and the Treasurer of the State of North Carolina, co-defendants in the lawsuit, have filed a cross-claim against Underwriters, a copy of which is attached hereto as Exhibit D, and Underwriters has filed an answer thereto, a copy of which is attached hereto as Exhibit E.

16. Underwriters is ready to mail to the guaranty associations pursuant to the terms of the Service Contract, certain monies which the Service Contract provides are to be remitted quarterly. Were it not for the North Carolina Association's filing of a lawsuit against Underwriters asserting a claim to Underwriters' deposits in North Carolina, certain monies would be remitted to the North Carolina Association. However, Underwriters does not feel it should remit monies to the North Carolina Association if, as Underwriters believes, the Association's filing of the lawsuit constitutes a breach of the Service Contract and a violation of the Court's final Order and the Plan and other orders of this Court. Underwriters has been forced to employ attorneys in North Carolina and has incurred other additional legal expense as a result of the North Carolina Association's actions. Underwriters believes it should be permitted to withhold funds from the North Carolina Association to compensate it for these expenses.

WHEREFORE, Underwriters asks that the Court determine whether or not Underwriters should pay monies under the Service Contract to the North Carolina Association and, in accordance with that determination, direct appropriate action by Underwriters in accordance with the Court's final Order and the Plan.

IV

Termination of The Rehabilitation Proceeding

17. On February 4, 1977, pursuant to paragraph (7) of the final Order, the Trustees appointed by the Court to serve as Trustees under the Voting Trust and Depository Agreement elected the initial post-rehabilitation Board of Directors of Underwriters.

18. Paragraph (12) of the final Order states:

> "Upon election of the Board of Directors of UNAC as directed in paragraph (7), UNAC shall be released from rehabilitation, and UNAC shall be permitted to resume possession of its property and the conduct of its business pursuant to IC 27-1-4-2, and this rehabilitation proceeding shall be terminated, subject, however, to the continuing jurisdiction retained by the Court. Upon such termination the Rehabilitator shall no longer serve in such capacity, and the Indiana Department of Insurance shall have the same relationship to UNAC as to any other insurance company organized under the laws of this State, except as specifically provided in the Plan. The right of the Indiana Department of Insurance pursuant to part VIII of the Plan to maintain a representative at UNAC's office after termination of this proceeding shall not any duty or obligation of the Department or any officer, agent, or employee thereof to the State of Indiana or any other entity or person that does not exist apart from that provision of the Plan."

19. Requests have been received by Underwriters from various state insurance departments for a single court document confirming that the rehabilitation proceeding was terminated on a certain date and that Underwriters

has resumed possession of its property and the conduct of its business. An Order of this Court stating that the election of the initial post-rehabilitation Board of Directors of Underwriters took place on February 4, 1977, thus terminating the rehabilitation proceeding, would facilitate the administrative business of Underwriters by eliminating any question as to the precise date of termination of the rehabilitation proceeding and the current status of Underwriters as a privately operated stock insurance company.

WHEREFORE, Underwriters asks the Court to enter an Order stating that as of February 4, 1977: (1) Underwriters was released from rehabilitation and thereupon resumed possession of its property and the conduct of its business; (2) the rehabilitation proceeding has terminated, subject to the specific continuing jurisdiction retained by this Court in the final Order; and (3) the Rehabilitator of Underwriters no longer serves in such capacity and the Indiana Department of Insurance has the same relationship to Underwriters as to any other stock insurance company organized under the laws of this State, except as specifically provided in the Plan.

V

Notification of Interested Parties

20. The undersigned attorneys for Underwriters certify that on July 13, 1978, a copy of this Petition was mailed to each of the attorneys listed on the Schedule of Attorneys for Service of Papers, a copy of which is attached hereto as Exhibit F. Copies were also sent to the Indiana Department of Insurance, 509 State Office Building, Indianapolis, Indiana, 46204, and to opposing counsel in the North Carolina lawsuit, Arch T. Allen, III, Allen, Steed and Allen, P.A., P.O. Box 2058, Raleigh, North Carolina, 27602, and Rufus L. Edmisten and Isham B. Hudson, Jr., North Carolina Department of Justice, P.O. Box 629, Raleigh, North Carolina, 27602.

21. Pursuant to orders of the Court dated June 6, 1977, and April 20, 1977, Indianapolis, Chicago, and Virginia class counsel for the policyowners were relieved of further responsibilities for representing any policyowner of Underwriters in this proceeding. While Underwriters believes that the Court and the Indiana Department of Insurance may sufficiently protect the interests of policyowners in this Petition and that the cost of mailing a notice of this Petition to each policyowner is not justified, Underwriters will notify whomever the Court directs of the filing of this Petition or take any other action the Court deems appropriate concerning the notification of interested parties.

BAKER & DANIELS

By /s/ Theodore R. Boehm

/s/ Charles T. Richardson

Attorneys for Underwriters National Assurance Company

810 Fletcher Trust Building
Indianapolis, Indiana 46204
317/636-4535

15.

[In The North Carolina Court of Justice
Superior Court Division, Wake County]

[Title omitted in printing]

NOTICE AND JOINT MOTION FOR SUMMARY JUDGMENT (Filed January 30, 1979)

TO ALL PARTIES, PLEASE TAKE NOTICE:

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiff, North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"), and Defendants, John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner") and Harlan E. Boyles, Treasurer of the State of North Carolina ("Treasurer"), by and through their attorneys, give notice and move as follows:

1. Pursuant to an order of rehabilitation dated November 22, 1976 signed by the Honorable Michael T. Doogan, II, Judge, Marion County Superior Court, Marion County, Indiana, the Defendant, Underwriters National Assurance Company ("UNAC"), has defaulted upon certain contractual obligations owed by UNAC to North Carolina policyholders.

2. Pursuant to Section 58-155.72(4) of the North Carolina Life and Accident and Health Insurance Guaranty Association Act, the Guaranty Association has assumed liability for the contractual obligations owed by UNAC to North Carolina policyholders to the extent that UNAC has defaulted on those obligations.

3. As shown by the attached Affidavit of Bobby W. Gray, Deputy Commissioner of the North Carolina

Department of Insurance, and as further shown by a Memorandum of Law to be submitted at the time of the hearing on this motion for summary judgment, there exists no genuine issue of material fact and this matter is otherwise a proper subject for summary judgment.

WHEREFORE, the Plaintiff and the Defendants, Commissioner of Insurance and Treasurer, pray:

(1) That the Court enter a judgment declaring the Plaintiff's and Defendants' powers, rights, duties and responsibilities with respect to the deposit as made by UNAC and left in trust with the Commissioner.

(2) That the Court enter a judgment declaring the Plaintiff's right to have said deposits applied to the payment of the contractual obligations of UNAC to the residents of North Carolina.

(3) That, if the Court should find that said deposits should be liquidated for the benefit of the Guaranty Association and/or other North Carolina policyholders, that the Defendant, Commissioner of Insurance, be appointed liquidator to act pursuant to law and the orders of this Court.

(4) That the Court enter a judgment excluding UNAC from any interest in said deposits and securities, except any interest in such sums as might remain after the sale thereof, and after application of the proceeds in payment of the contractual obligations of UNAC.

(5) That the Court enter a judgment providing for its retention of jurisdiction and for the granting of such other necessary or proper relief, as requested in Plaintiff's first and second claims for relief and Defendants' counterclaim and crossclaim, and extending to all matters germane to the powers and duties of the parties.

(6) That the Court dismiss the counterclaim of Defendant, UNAC, against Plaintiff.

(7) For such further relief as the Court may deem just and proper.

Submitted this 30th day of January, 1979.

RUFUS L. EDMISTEN,
Attorney General

By /s/ Richard L. Griffin,
Assistant Attorney General

Attorney for
Defendants, John
Randolph Ingram,
Commissioner of
Insurance of the State
of North Carolina, and
Harlan E. Boyles,
Treasurer of the State
of North Carolina

Allen, Steed and Allen, P.A.
By /s/ William S. Patterson
By /s/ Charles D. Case

Attorneys for Plaintiff,
North Carolina Life and
Accident and Health
Insurance Guaranty
Association

16.

[In The North Carolina Court of Justice
Superior Court Division, Wake County]

[Title omitted in printing]

MOTION FOR SUMMARY JUDGMENT AND NOTICE OF HEARING (Filed March 12, 1979)

Underwriters National Assurance Company, a defendant herein, moves the Court pursuant to Rule 56 of the Rules of Civil Procedure for a summary judgment on the ground that there is no genuine issue as to any material fact as shown by the pleadings together with the affidavit attached hereto and certified copies of the pertinent regulations and statutes; and movant is entitled to judgment as a matter of law.

Take notice that Underwriters National Assurance Company will bring this motion on for hearing at 3:00 p.m. or as soon thereafter as the matter may be reached on March 19, 1979, before the Honorable James H. Pou Bailey, Judge Presiding, Courtroom Number 11, Wake County Courthouse, Raleigh, N.C.

This the 12th day of March, 1979.

PURRINGTON, HATCH &
McNAMARA, P.A.

BY /s/ Ashmead P. Pipkin
Attorney for Underwriters
National Assurance Company,
Defendant

OF COUNSEL:

Baker & Daniels
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Indianapolis, Indiana 46204
Telephone: (317) 636-4535

Office-Supreme Court, U.S.
FILED
APR 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION; JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

William S. Patterson
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Counsel for the Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

COUNTER-QUESTION PRESENTED

Whether North Carolina courts must give full faith and credit to an Indiana judicial assertion of jurisdiction that would abrogate statutory rights of North Carolina policyholders in a deposit placed in trust in North Carolina by an insolvent insurer domiciled in Indiana, where:

(a) The deposit was made with the North Carolina Treasurer "for the sole benefit of North Carolina policyholders," and North Carolina law prescribes the rights of those policyholders in the deposit, and

(b) The Indiana court, seeking to rehabilitate the insurer, lacked any *in rem* jurisdiction over the North Carolina trust and lacked any *in personam* jurisdiction over the North Carolina policyholders or the North Carolina officials holding the deposit.

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the state courts below.

The Respondent, North Carolina Life and Accident and Health Insurance Guaranty Association, is a statutorily created association and is not a corporation having parent companies, subsidiaries or affiliates. All of the 604 life and accident and health insurance companies doing business in North Carolina are required by statute to be members of the Guaranty Association. N.C.Gen.Stat. §§ 58-155.65 *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1496

UNDERWRITERS NATIONAL ASSURANCE COMPANY

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION; JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"); John Randolph Ingram, Commissioner of Insurance of the State of North Carolina ("Commissioner of Insurance"); and Harlan E. Boyles, Treasurer of the State of North Carolina ("North Carolina Treasurer"), respectfully request that this Court deny the Petition for Writ of Certiorari filed by Underwriters National Assurance Company ("UNAC").

JURISDICTION

The Guaranty Association commenced a declaratory judgment action in the Superior Court of Wake County, North Carolina, on January 12, 1978, seeking a declaration with regard to rights in a deposit made by UNAC in North Carolina for the protection of North Carolina policyholders. The Superior Court entered a summary judgment in favor of the Guaranty Association on April 11, 1979. (Pet. App. pp. 19A-28A.) UNAC appealed the Superior Court judgment. On September 2, 1980, the North Carolina Court of Appeals unanimously upheld the Wake County Superior Court. (Pet. App. p. 5A-16A.) UNAC then filed a Notice of Appeal and Alternative Petition for Discretionary Review with the North Carolina Supreme Court. On December 4, 1980, the North Carolina Supreme Court entered a judgment dismissing UNAC's appeal and denying UNAC's petition for discretionary review. (Pet. App. p. 1A-2A.)

Since the North Carolina Supreme Court declined to exercise its authority to review, the Petition filed by UNAC errs in requesting that the petition for certiorari be directed to the Supreme Court of North Carolina. *Sullivan v. Texas,* 207 U.S. 416 (1907). The opinion of the North Carolina Court of Appeals is reported at 48 N.C. App. 508, 269 S.E.2d 688 (1980). It is the judgment encompassed in that opinion that is the proper subject of the review requested by UNAC.

UNAC filed its petition for certiorari in this Court on March 3, 1981, less than 90 days after entry of the December 4, 1980 judgment of the Supreme Court of North Carolina.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petition omits portions of the North Carolina Life and Accident and Health Insurance Guaranty Association Act ("Guaranty Act"), N.C. Gen. Stat. §§ 58-155.65 *et seq.*, that pertain to the duties, obligations and rights of the Guaranty Association. N.C. Gen. Stat. § 58-155.66, 58-155.72(4) and (9), and 58-155.73(a). The Petition also omits portions of the North Carolina enactment of the Uniform Insurers Liquidation Act, N.C.Gen.Stat. §§ 58-155.10 *et seq.*, which pertain to statutory rights of North Carolina policyholders in deposits made by insolvent insurers for the protection of North Carolina policyholders. N.C.Gen.Stat. §§ 58-155.10(2), (8) and (10), 58-155.15(d). These statutes, which are expressly applicable to both liquidation and rehabilitation proceedings, together with the North Carolina deposit statute, N.C.Gen.Stat. § 58-185, are set forth in Appendix A.

STATEMENT OF THE CASE

The statement of the case in the Petition omitted several important facts essential to a complete understanding of this case. This portion of the brief in opposition is supplemental to the statement of the case contained in the Petition and is not intended to be a complete restatement of the case.

As a result of the questionable financial condition of UNAC, the North Carolina Department of Insurance required that UNAC make a $100,000.00 deposit in North Carolina for the protection of North Carolina policyholders. By letter dated June 18, 1973, UNAC stated that it was taking the necessary steps to have $100,000.00 in securities transferred to the North Carolina Department of Insurance to be held in trust for *"the sole benefit of*

North Carolina policyholders." (Emphasis added) (Pet. p. 20A.) UNAC's deposit was registered as follows:

> "Treasurer of the State of North Carolina *in trust* for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina Statutes." (Emphasis added.) (Pet. pp. 6A, 21A.)

UNAC was subsequently determined to be insolvent and, on August 5, 1974, became the subject of an Indiana State Court rehabilitation proceeding. The final Order and Plan of Rehabilitation ("Plan") was issued by the Indiana court on November 22, 1976. Pursuant to the Plan, the Indiana court allowed UNAC to alter substantially contractual obligations in its policies. Many of UNAC's insurance policies involved guaranteed premium amounts with a return of premium rider ("RPR"). The RPR, for which there was an additional premium charge, typically provided that, if disability claims during any period of ten consecutive years equaled less than 20 percent of the premiums paid during that same period, 80 percent of the premiums paid, less the amount of any disability claims paid, would be returned to the policyholder. The Plan allowed UNAC to increase substantially the previously guaranteed premiums. The Plan also cancelled all obligations owed by UNAC pursuant to the RPR after payment by UNAC to policyholders of an amount equal to only 15.68 percent of the additional premium paid for the RPR. (Pet. p. 22A.)

The Guaranty Association is liable under the Guaranty Act to pay the premium increases allowed by the Plan and to pay all RPR benefits that were cancelled by the Plan. N.C.Gen.Stat. § 58-155.72(4). The Guaranty Association is statutorily subrogated under the Guaranty Act to the

rights of North Carolina policyholders of UNAC. N.C.Gen.Stat. § 58-155.72(9). The UNAC policyholders residing in North Carolina have specific rights in the deposit made by UNAC under the North Carolina enactment of the Uniform Insurers Liquidation Act and the North Carolina deposit statute. N.C.Gen.Stat. §§58-155.15(d) and 58-185. The Guaranty Association is seeking through its subrogation rights to obtain the deposit made by UNAC for use in paying the defaults (premium increases and RPR liability) allowed by the Plan. (Pet. pp. 14A-15A.) Absent the existence of the deposit made by UNAC in North Carolina for the protection of North Carolina policyholders, the Guaranty Association would be forced to pay these defaults by assessing its member insurers.

The deposit made by UNAC in North Carolina, and the rights under North Carolina Statutes therein, were not mentioned by the Indiana court in the Plan. Similarly, none of the documents filed with the Indiana court by the rehabilitator and none of the orders issued by the court dealt with, or even mentioned, the North Carolina deposit. The Indiana proceeding did not notify the North Carolina policyholders of the existence of the deposit or of their statutory rights in that deposit. UNAC implies that the Guaranty Association was put on notice that the rehabilitation court purported to adjudicate rights in the deposit because the deposit was included in the general assets of UNAC under part V of the Plan. (Pet. p. 9, n. 8.) Part V of the Plan pertains to the method used in determining liquidated cash values that were received by policyholders electing not to participate in the rehabilitation and has nothing to do with jurisdiction. The $100,000.00 deposit in North Carolina is not specifically mentioned in part V of the Plan. Apparently, UNAC is contending that the $100,000.00 deposit was included in

the $31,171,988.00 entry in part V listed as "Assets at Book Value per UNAC's September 30, 1975 Financial Statement."

Approximately one year after the final Order of rehabilitation was issued by the Indiana court, UNAC informed the Guaranty Association that it was taking the position that the rehabilitation proceeding in Indiana cut off any rights of North Carolina policyholders in the deposit made for their protection. The Guaranty Association then initiated a declaratory judgment proceeding in the Wake County, North Carolina, Superior Court on January 12, 1978, seeking a determination of the rights of North Carolina policyholders and the Guaranty Association in the deposit made by UNAC.

UNAC responded to the North Carolina declaratory judgment proceeding by filing a "Petition for Instructions" with the Indiana rehabilitation court on July 13, 1978. In response to UNAC's Petition for Instructions, the Indiana court issued an order on November 22, 1978. That order held that, despite the fact that North Carolina policyholders were not notified of the existence of the deposit and the fact that the deposit was not mentioned or dealt with by the court at any point in the rehabilitation proceeding, the 1976 final Order and the Plan "comprised, settled and dismissed, any rights of North Carolina policyholders in the deposit." (Pet. App. p. 38A.) The November 22, 1978 order of the Indiana Superior Court was appealed to the Indiana Court of Appeals. The appellate proceeding in Indiana has been fully briefed and oral argument has been heard. On March 11, 1981, the Indiana Court of Appeals granted the Guaranty Association's motion to stay consideration of the appeal pending this Court's decision with regard to the Petition for Certiorari filed by UNAC.

On April 11, 1979, the Superior Court of Wake County, North Carolina, determined that the Indiana rehabilitation court lacked the necessary jurisdiction to adjudicate rights in the deposit made in North Carolina for the protection of North Carolina policyholders and, thus, that the November 22, 1976 and November 22, 1978 orders of the Indiana rehabilitation court were not entitled to full faith and credit. The North Carolina Superior Court then determined that the deposit made by UNAC in North Carolina should be applied for the benefit of North Carolina policyholders. The North Carolina Court of Appeals unanimously affirmed the Wake County Superior Court in an opinion dated September 2, 1980 (Pet. App. pp. 5A-16A). By judgment dated December 4, 1980, (Pet. App. p. 1A) the North Carolina Supreme Court dismissed the notice of appeal and denied the alternative petition for discretionary review filed by UNAC.

UNAC conceded in arguments below, and the North Carolina courts found, that neither the Commissioner of Insurance nor the Trustee of the deposit, the North Carolina Treasurer, was before the Indiana rehabilitation court. (Pet. pp. 15A, 21A.)

Since the North Carolina policyholders have statutory rights in the deposit made by UNAC for their protection, their interests are in conflict with the other policyholders of UNAC who look to the company's general assets. Despite the substantial conflict of interest in the single policyholder class, the North Carolina policyholders were neither apprised of their conflicting rights nor represented before the Indiana court with regard to those rights.

The North Carolina Guaranty Association appeared before the Indiana rehabilitation court both for the purpose of negotiating a service contract under which UNAC would continue to service North Carolina policyholders

and for the purpose of having its rights under the Guaranty Act acknowledged. The Guaranty Association's liability and subrogation rights did not arise under the Guaranty Act until after the final Order and Plan was issued. N.C.Gen.Stat. §§ 58-155.72(4) and (9). The Guaranty Association, like the North Carolina policyholders, received absolutely no notification that the rehabilitation court purported to be dealing with the deposit made in North Carolina until well after the Indiana court's final Order approving the Plan.

REASONS FOR NOT GRANTING THE WRIT

UNAC asserts that the North Carolina courts are bound to give full faith and credit to the 1976 and 1978 orders of the Indiana rehabilitation court. As reasons why certiorari should issue to enforce that constitutional obligation, UNAC advances two contentions: (1) an asserted conflict between the result below and prior decisions of this Court, and (2) the alleged national importance of the purported issue "whether the decisions of the domiciliary state of an impaired insurer are to be given nationwide effect." (Pet. p. 12.) Neither contention is justified.

The decision of the North Carolina Court of Appeals is entirely consistent with prior cases of this Court involving the full faith and credit clause and does not present any novel interpretations or questions in connection with the application of that clause. This case does not present issues of national importance, since the decision of the Court of Appeals does not pose any threat to the proper nationwide effect to be given insurance company rehabilitations. The decision by the North Carolina Court of Appeals turns solely on a unique jurisdictional determination and specific North Carolina statutes pertaining

to deposits made by foreign insurance companies for the protection of North Carolina policyholders.

The Indiana Court's Lack of Jurisdiction. The decision by the North Carolina Court of Appeals follows prior cases of this Court holding that full faith and credit need not be given to an opinion rendered by a court not having jurisdiction. *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457 (1873). *Accord, May v. Anderson,* 345 U.S. 528, 533 (1953); *Williams v. North Carolina,* 325 U.S. 226, 229 (1945); *Riley v. New York Trust Co.,* 315 U.S. 343, 353, *reh. den.,* 315 U.S. 829 (1942); *Roche v. McDonald,* 275 U.S. 449, 454 (1928); *Baker v. Baker, Eccles & Co.,* 242 U.S. 394, 401-02 (1917). The full faith and credit clause does not require one state to accept the judicial determination of a sister state as to which possesses jurisdiction in a given case. *Thompson v. Whitman, supra.*

There are several glaring jurisdictional defects in the Indiana court's attempt to abrogate rights under the North Carolina statutes in the deposit located in North Carolina. UNAC has previously conceded that the North Carolina Treasurer, who was the trustee of the deposit, was not a party in the Indiana insolvency proceeding, and that the deposit is physically located in North Carolina. It is inconceivable that the North Carolina Treasurer could be compelled by the Indiana court to deal with the deposit in North Carolina as trustee in a way that is inconsistent with North Carolina statutes to which he is subject without even being a party before the Indiana court. Additionally, the North Carolina policyholders of UNAC could not have been properly included in the one policyholder class before the court in Indiana since they were the only policyholders protected by a special deposit. To the extent the deposit was used for the benefit of North Carolina policyholders, it would not be a general asset that could

benefit the other policyholders. Such a basic conflict of interest cannot exist within a jurisdictional class. Indiana Trial Rule 23(A); *Kimes v. Gary*, 224 Ind. 294, 66 N.E.2d 888 (1946); *McKenna v. Standard Oil Co.*, 236 Ind. 370, 140 N.E.2d 512 (1957); *Smith v. Sparks Milling Co.*, 219 Ind. 576, 39 N.E.2d 125 (1942); *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223, *cert. den.*, 297 N.C. 609, 257 S.E.2d 217 (1979).

Further, and perhaps most importantly, the Indiana proceeding failed even to notify the North Carolina policyholders of the existence of the deposit or their statutory rights in that deposit. If the Indiana proceeding could abrogate such rights without the slightest semblance of notice of those rights, substantial due process, as well as full faith and credit, questions would arise.

In addition to not having the requisite personal jurisdiction to adjudicate rights in the North Carolina deposit, the Indiana Court also lacked *in rem* jurisdiction over the *res, i.e.*, the trust held by the officials of North Carolina. *Continental Bank and Trust Co. v. Gold*, 140 F.Supp. 252 (E.D.N.C. 1956). In *Continental Bank and Trust Co. v. Gold, supra*, the Federal District Court for the Eastern District of North Carolina considered whether a receiver appointed by the Federal District Court in Utah could require the Commissioner of Insurance and the North Carolina Treasurer to turn over a deposit made by an insurance company for the protection of North Carolina policyholders of that company. Despite the fact that, unlike in the instant case, the priority of North Carolina policyholders would have apparently been honored by the Utah federal receiver, the North Carolina Federal District Court refused to order the North Carolina Treasurer to surrender the deposit. The District Court held that the title and right to securities deposited in North Carolina were vested in the Commissioner of Insurance and the North

Carolina Treasurer as trustees, and, thus, were not property of the insurance company subject to the jurisdiction of the Utah federal receivership. The North Carolina Court of Appeals acknowledged in the decision below that *Continental Bank and Trust Co. v. Gold, supra,* correctly stated the North Carolina law. (Pet. App. p. 15A.)

UNAC argues that the North Carolina courts could not determine that the Indiana rehabilitation court lacked jurisdiction to abrogate rights under North Carolina statutes because the issue of jurisdiction was "fully and fairly litigated in the Indiana rehabilitation court," citing *Durfee v. Duke,* 375 U.S. 106 (1963). (Pet. pp. 17-18.) At no point in the rehabilitation proceeding was the existence of the deposit in North Carolina or the rights in that deposit under North Carolina statutes addressed by the Indiana court. (Pet. p. 23A.) The deposit made in North Carolina was not individually listed as an asset of UNAC, and the North Carolina policyholders were not told of its existence. Not only did the Indiana court fail to fully and fairly adjudicate the question of jurisdiction over the deposit it apparently completely overlooked the rights under North Carolina statutes in that deposit. The Indiana court's retrospective holding two years after the final Order and Plan that it had jurisdiction over the deposit and that its order did, in fact, abrogate the statutory rights of North Carolina policyholders in that deposit falls far short of "fully and fairly" litigating the issue of jurisdiction.

The Decision by the Court Below. The decision of the North Carolina Court of Appeals is also consistent with prior decisions of this Court, as well as the courts of many of the states, concerning the validity of deposits. This Court in *Blake v. McClung,* 172 U.S. 239, 257 (1898), spoke approvingly of such special deposits:

> "Insurance funds set apart in advance for the benefit of home policyholders of a foreign insurance company doing business in the State are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other States know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited."

The Court in *Blake v. McClung* then addressed the constitutional validity of such deposits in stating that "[l]egislation of that character does not present any question of discrimination against citizens forbidden by the Constitution." *Id.*

The decision of the North Carolina Court of Appeals tracks the overwhelming weight of authority holding that deposits made by an insolvent insurer for the protection of a specified group of policyholders must be used for the purpose for which the deposit was made.[1] For instance, in *Preferred Insurance Co. v. Bentley, supra,* a Michigan insurance company had made deposits with Georgia State officials for the benefit of local policyholders. Georgia, like North Carolina, had enacted the Uniform Insurers Liquidation Act. Michigan, like Indiana, had not enacted the Uniform Insurers Liquidation Act. The Georgia

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[1] *E.g., State v. American Bonding and Casualty Co.*, 206 Io. 988, 221 N.W. 585, 586 (1928); *Boston-Alb. Railroad v. Mercantile Trust and Deposit Co. of Baltimore*, 82 Md. 535, 34 A. 778, 780 (1896); *Maurer v. International Re-Insurance Corp.*, 20 Del. Ch. 173, 174 A. 360 (1934); *Preferred Insurance Co. v. Bentley*, 223 Ga. 735, 157 S.E.2d 737 (1967); *State* v. *Bowen*, 131 O.St. 310, 2 N.E.2d 824 (1936); 2 *Couch on Insurance* §§ 22:94, 22:96, 22:111 (2d ed. 1959); 19 Appleman, *Insurance Law and Practice* § 11094 (1946); 43 Am.Jr.2d, *Insurance* §§ 139, 140 (1969); 44 C.J.S., *Insurance* § 134 (1945); 5 Joyce, *Law of Insurance* § 3595 (2d ed. 1918).

Supreme Court held that the deposits were to be used first to the benefit of local claimants, with the balance, if any, to be paid to the domiciliary receiver. "[T]here is hardly a break in the line of decisions to the effect that receivers and assignees are not entitled to demand or obtain the possession of such securities . . . ." *Vandiver v. Poe,* 119 Md. 348, 87 A. 410, 413 (1913).[2]

State Grounds. This is not an appropriate case for this Court to act as "umpire" of the federal system. The decision of the North Carolina Court of Appeals in this case is based on adequate state grounds. The North Carolina Court of Appeals held, as a matter of state law, that the deposit was held in trust exclusively for the benefit of North Carolina policyholders, and, therefore, "was not an asset of the company subject to the Indiana rehabilitation proceeding." (Pet. p. 15A.) That holding was based upon specific facts pertaining to jurisdiction and upon the Court of Appeals' interpretation of the North Carolina statutes and case law pertaining to insurance company deposits. This Court has held that it is inappropriate to review such a judgment. *E.g., Neblett v. Carpenter,* 305 U.S. 297, 302 (1938), *reh. den.,* 305 U.S. 675 (1939); *Fox Film Corporation v. Muller,* 296 U.S. 207, 210 (1935); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 636 (1874).

UNAC's Petition. UNAC's Petition cites four cases pertaining to the rehabilitation of Pacific Mutual Life In-

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[2] *Accord, McMurray v. Commonwealth,* 249 Mass. 574, 144 N.E. 718 (1924); *Crowell v. Terrell,* 250 S.W. 252 (Tex. Civ. App. 1923); *Cook v. Warner,* 56 Conn. 234, 14 A. 798 (1888); *In re Guardian Mutual Life Insurance Co.,* 13 Hun. 115 (N.Y.S. Ct. 1878), *aff'd.,* 74 N.Y. 617 (1878); *Ruggles v. Chapman,* 59 N.Y. 163 (1874). See also the dicta of the United States Supreme Court quoted above in *Blake v. McClung, supra.*

surance Company of California. (Pet. p. 13.)[3] None of those cases support UNAC's contention that the Indiana rehabilitation proceeding could abrogate statutory rights of North Carolina policyholders in the deposit made in North Carolina for their protection. In *Neblett v. Carpenter, supra,* this Court considered attempts by policyholders of the insolvent insurance company to enforce pre-insolvency contractual rights owed to them under their policies. The other three cases involved similar attempts. Those cases support the proposition that pre-rehabilitation *contractual rights* may be modified pursuant to a rehabilitation proceeding having the necessary jurisdiction. However, aside from the Indiana court's lack of jurisdiction, the cases cited by UNAC are not determinative of the issue now before this Court for two other reasons.

First, the rights of the North Carolina policyholders and, through subrogation, the Guaranty Association are not *contractual rights.* (Pet. p. 15A, 26A.) The claims against UNAC now before this Court are *statutory rights* based upon the laws of North Carolina. While a rehabilitation proceeding can alter a policy contract, the full faith and credit provision of the Constitution would prevent the abrogation of another state's statutes by a rehabilitation proceeding. It is well established that statutes of a state are "public acts" to be accorded full faith and credit under the Constitution. U.S. CONST., art IV, § 1; 28 U.S.C. § 1738; *Carroll v. Lanza,* 349 U.S. 408

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[3] *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.,* 10 Cal.2d 307, 74 P.2d 761 (1937). *aff'd., Neblett v. Carpenter,* 305 U.S. 297 (1938); *Taylor v. Pacific Mut. Life Ins. Co. of Cal.,* 214 N.C. 770, 200 S.E. 882 (1939); *Larson v. Pacific Mut. Life Ins. Co. of Cal.,* 373 Ill. 614, 27 N.E.2d 458, *cert. den.,* 311 U.S. 698 (1940); *Padway v. Pacific Mut. Life Ins. Co. of Cal.,* 42 F.Supp. 569 (E.D.Wis. 1942).

(1955); *Hughes v. Fetter,* 341 U.S. 609 (1951); *Bradford Electric Co. v. Clapper,* 286 U.S. 145 (1932).

Secondly, the statutory rights of North Carolina policyholders and the Guaranty Association do not pertain to the general assets of UNAC. Rather, the claims before this Court pertain to deposits made for the protection of North Carolina policyholders in the event of the very circumstance that occurred. Since the authorities cited by UNAC do not concern deposits, those authorities did not have to take into account the long, consistent line of cases giving priority to persons for whose protection deposits were made. Examples of the many cases and treatises dealing specifically with the application of special deposits, including *Blake v. McClung, supra,* have been cited above. The other cases cited by UNAC (Pet. p. 13) involving shareholders' and agents' contractual claims against the general assets of the rehabilitated company are similarly inapplicable.

UNAC also cites a number of cases to support its contention that deference must be given to domiciliary insolvency proceedings (Pet. p. 13). Again, none of those cases deal with deposits made for security, or with the abrogation of another state's statutes by the domiciliary proceeding. Indeed, in one of the cases cited by UNAC, this Court acknowledged that if there is a local policy expressed in statute or by decision allowing a distribution of assets of a foreign insolvent corporation in favor of local creditors, such a policy would prevail. *Clark v. Willard,* 292 U.S. 112, 121-23 (1934). Such a policy is clearly expressed in North Carolina's enactment of the Uniform Insurers Liquidation Act, which is explicitly applicable to rehabilitation proceedings, and in N.C.Gen.Stat. § 58-185. This local policy draws considerable strength from this Court's acknowledgement of the special status to be afforded deposits in *Blake v. McClung, supra.*

UNAC appears to argue that the North Carolina statutory rights were somehow waived (Pet. p. 14). This waiver argument, however, ignores the fact that the Indiana court lacked the necessary jurisdiction to deal with the deposit and the fact that no one had any reasonable notice that the Indiana rehabilitation proceeding purported to be dealing with the deposit.

The citation by UNAC (Pet. p. 17) of *Relfe v. Rundle*, 103 U.S. 222 (1880) and *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), is rather confusing. It would seem that UNAC is arguing that North Carolina must apply the conflicting law of other states to foreign corporations domesticated in North Carolina. Neither of the cases cited by UNAC stand for that proposition. Indeed, the quotation from *Relfe v. Rundle* in UNAC's petition, consistent with other decisions of this Court, clearly indicates that local law will be applied to the domesticated corporation, rather than the inconsistent law of the corporation's domiciliary state. *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 502 (1939). UNAC subjected itself to the statutes dealing with insurance company deposits when it elected to do business in North Carolina. The North Carolina Superior Court found that the Indiana court's actions were "contrary to the applicable law regarding rights in deposits made by foreign insolvent insurance companies as established under Article 17A and Article 20 of the General Statutes of North Carolina." (Pet. p. 26A.)

UNAC also cites *Riehle v. Margolies*, 279 U.S. 218 (1929); *Morris v. Jones*, 329 U.S. 545, *reh. den.*, 330 U.S. 854 (1947); and *Continental Bank and Trust Co. v. Apodaca*, 239 F.2d 295 (10th Cir. 1956); (Pet. p. 19). Both *Riehle* and *Morris* pertain only to the evidentiary effect of a judgment rendered in another jurisdiction. Those cases clearly hold that, in order for a judgment in another

jurisdiction to be recognized, it must be rendered by a court having jurisdiction over the parties and the subject matter. Further, it should be noted that in neither *Reihle* nor *Morris* was the "res" a trust. If neither the trustee nor the trust property is subject to the state jurisdiction, a state court has no jurisdiction over the trust property. *See* W. LAND, TRUSTS IN THE CONFLICT OF LAWS 257 (1940). *Apodaca* involved the question of concurrent jurisdiction of a federal and state court and, thus, is readily distinguishable from the situation in which two state courts both purport to have jurisdiction. Significantly, the Tenth Circuit acknowledged in *Apodaca* that policyholders have special rights in deposits such as the one made by UNAC in North Carolina and stated that " 'to give effect to its jurisdiction, the court must have control of the property,' " 239 F.2d at 298, *quoting Princess Lida v. Thompson,* 305 U.S. 456, 466 (1939).

UNAC states that "after UNAC was released from rehabilitation *there was and is no policyholder in North Carolina who had or has any contract breach claim*" (UNAC's emphasis) and that "UNAC is not currently in default of any contractual obligation to policyholders in North Carolina or any place else." (Pet. p. 19.) These statements, along with the assertion that the deposit is not now subject to the North Carolina insolvency statutes, merely beg the jurisdictional question. The issue is whether the Indiana court lacked jurisdiction to deal with the deposit made by UNAC in North Carolina. Since the Indiana court did lack jurisdiction, it could not prevent the deposit from being used for the purpose for which it was intended – the protection of North Carolina policyholders in the event of an insolvency. UNAC's contention (Pet. p. 19) that it is no longer an "impaired insurer" under the Guaranty Act, is patently inconsistent with the simple wording of that statute. N.C.Gen.Stat. § 58-155.69(6). An "impaired insurer" under the Guaranty

Act is an insurer that " . . . is placed under a *final order* of liquidation, rehabilitation or conservation . . ." (Pet. App. 45A) Rather than removing UNAC from the definition of an"impaired insurer," the final Order of rehabilitation satisfied one of the two alternative conditions for UNAC being so classified.

Finally, UNAC asserts that the opinion of the North Carolina court "renders impossible the rehabilitation of a multi-state insurer." (Pet. p. 21.) This cataclysmic statement is, of course, incorrect. An analogy to rehabilitative bankruptcy proceedings involving secured creditors is appropriate. Despite the fact that secured creditors are given priority as to their security, successful rehabilitative bankruptcy proceedings frequently occur.

This is simply a case in which the Indiana court did not have the jurisdiction necessary to deal with the North Carolina deposit.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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APPENDIX

STATE STATUTES INVOLVED

North Carolina Insurance Law

Uniform Insurers Liquidation Act
N.C.Gen. Stat. §§ 58-155.10(2), (8) and (10);

Uniform Insurers Liquidation Act: definitions – This section and G.S. 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the Uniform Insurers Liquidation Act. For the purposes of this act:

* * *

(2) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing and conserving such insurer.

* * *

(8) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

* * *

(10) "Secured claim" means any claim secured by mortage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

N.C.Gen. Stat. § 58-155.15(d):

Priority of certain claims –

* * *

(d) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act [G.S. 58-155.10 to 58-155.17], or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the deliquency proceeding in the domiciliary state.

North Carolina Life and Accident and Health Insurance Guaranty Act.
N.C.Gen.Stat. § 58-155.66:

Purpose – The purpose of this Article is to maintain public confidence in the promises of insurers, to provide a mechanism for the payment of covered claims under certain insurance policies, to assist in the detection and prevention of insurer insolvencies, and to protect policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts. To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of con-

tinuation of coverages, (ii) members of the Association are subject to assessment to provide funds to carry out the purpose of this Article, and (iii) the Association is authorized to assist the Commissioner, in the prescribed manner, in the detection and prevention of insurer impairments.

N.C.Gen.Stat. § 58-155.72(4) and (9):

Powers and duties of the Association – In addition to the powers and duties enumerated in other sections of this Article:

* * *

(4) If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the Association shall, subject to the approval of the Commissioner:
a. Guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured the covered policies of residents;
b. Assure payment of the contractual obligations of the impaired insurer to residents; and
c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.
If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

* * *

(9) a. Any person receiving benefits under this Article shall be deemed to have assigned his rights under the covered policy to the Association to the extent of the benefits received because of this Article whether the benefits are payments

of contractual obligations or continuation of coverage. The Association may require an assignment to it of such rights by any payee, policy or contract owner, beneficiary, insurer or annuitant as a condition precedent to the receipt of any rights or benefits conferred by this Article upon such person. The Association shall be subrogated to these rights against the assets of any impaired insurer.

b. The subrogation rights of the Association under this subdivision shall have the same priority against the assets of the impaired insurer as that possessed by the person entitled to receive benefits under this Article.

N.C.Gen.Stat. § 58-155.73(a):

Assessments – (a) For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the board of directors shall assess the member insurers, separately for each account, at such times and for such amounts as the board finds necessary. The board shall collect the assessments after 30 days' written notice to the member insurers before payment is due. In the event that the member insurers do not within the time prescribed pay the assessment set by the board, the Association may file suit against such member insurers jointly and severally for the amounts necessary to carry out the responsibilities of the Association as determined by the board of directors.

Deposit Statute
N.C.Gen.Stat. § 58-185:

Lien of policyholders; action to enforce. – Upon the securities deposited with the Commissioner of Insurance

by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance.

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NO. 80-1496

IN THE

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OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

PETITIONER'S REPLY BRIEF

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JURISDICTION — CERTIORARI TO THE NORTH CAROLINA SUPREME COURT IS PROPER

The North Carolina Supreme Court (a) denied discretionary review (presumably as to the state law issues raised before that court) and (b) dismissed an appeal. The order is at 1A-2A of the appendix to the petition. An appeal as of right is available under North Carolina procedures if a federal constitutional issue is raised. N.C.G.A. 7A-30. The only issue raised here is, of course, the federal constitutional point. Under those circumstances, the Supreme Court of the state of North Carolina is the "highest court of a State in which a decision could be had" as to the issue presented to this Court within the meaning of 28 U.S.C. § 1257. *Tumey v. Ohio*, 273 U.S. 510, 515 (1926) is squarely in point. *See generally*, STERN & GRESSMAN, SUPREME COURT PRACTICE 204-206 (5th ed. 1978).

THE DECISION IS INDEED "CATACLYSMIC"

Respondents argue that the "cataclysmic" (Resp. 18) impact of the decision below is avoided because respondent (or the North Carolina policyholders) may be analogized to secured creditors who may receive a preference in a bankruptcy. The point, however, is that in order to receive their priority, secured creditors must assert it in the bankruptcy, not in a later proceeding. The decision below holds that the rights of the North Carolina policyholders or respondent guaranty association were not and *could not be* adjudicated in Indiana because of the asserted jurisdictional defect. For that reason, the decision is, to use respondents' term, cataclysmic.

Respondents also seek to attack the notice to North Carolina policyholders and/or the adequacy of their representation. First, that is not a basis of the holding below, which is that regardless of any notice, the Indiana

court could not adjudicate the rights of North Carolina policyholders or respondent in the deposit in that state. Second, notice as to the deposit is wholly immaterial to the North Carolina *policyholders* because their rights under the policies as written were fully protected and preserved by the obligations of respondent as a guaranty association. The real party in interest as to the North Carolina policies was the respondent guaranty association. It is an association of 604 insurance companies and is charged with knowledge of the deposit laws of its state. It was a named party to, and participated in, the rehabilitation proceeding. Third, this issue was not raised in the subsequent 1978 Indiana proceeding and is itself waived. The 1978 Indiana holding is entitled to full faith and credit.

Finally, petitioner agrees that the North Carolina deposit could have been allocated under North Carolina law to North Carolina policyholders *if* that were done before the judgment of rehabilitation. That is all respondents' cases stand for. Of course, if that had been done, an appropriate adjustment would have been made to the North Carolina policy rights under the plan. It was not done. As a result, the judgment is entitled to full faith and credit as entered.

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QUESTIONS PRESENTED

The North Carolina courts held that an Indiana insurance company's deposit in North Carolina could be reached to satisfy pre-rehabilitation obligations of the insurer, notwithstanding the prior judgment of an Indiana court adopting a plan of rehabilitation that compromised those obligations. The following questions are presented:

Was the 1976 Final Judgment of the Indiana Rehabilitation Court entitled to full faith and credit so as to bind all policyholders and the North Carolina Life and Accident and Health Insurance Guaranty Association ("NCGA") to the Plan of Rehabilitation for Underwriters National Assurance Company ("UNAC")?

In any event, did the 1978 Order of the Indiana Rehabilitation Court preclude any attack by the NCGA on the Plan?

If the Plan is binding as among UNAC, its policyholders, and the NCGA, can the North Carolina officials nonetheless upset it?

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the North Carolina state courts.

The petitioner, UNAC, an Indiana insurance company, currently has no parent companies, subsidiaries or affiliates. However, prior to UNAC's rehabilitation in 1977 when its stock was placed in a voting trust, all of UNAC's stock was owned by UNAC International Corporation, an Indiana general business corporation.

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Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The December 4, 1980, judgment of the Supreme Court of North Carolina (Pet. App. 1A-2A)[1] is reported at 301 N.C. 527, 273 S.E.2d 453. The September 2, 1980, opinion of the North Carolina Court of Appeals (Pet. App. 5A-16A) is reported at 48

[1] References to the Appendices to the Petition for a Writ Of Certiorari will be made by "Pet. App." followed by the page number.

N.C. App. 508, 269 S.E.2d 688. The April 11, 1979, order of the North Carolina trial court (Pet. App. 19A-28A) is not reported. The November 22, 1978, Order of the Indiana trial court in a related case (Pet. App. 31A-41A) now on appeal by the NCGA to the Court of Appeals of Indiana is not reported.

JURISDICTION OF THE SUPREME COURT

The judgment of the North Carolina Supreme Court was entered on December 4, 1980 (Pet. App. 1A). The petition for certiorari was filed on March 3, 1981, and was granted on May 18, 1981. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 1, United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article I, Section 8, Clause 3, United States Constitution:

> "The Congress shall have Power***;
>
> "To regulate Commerce***among the several States,***;"

28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

State Statutes

Pet. App. 42A-45A includes relevant portions of the insurance laws of Indiana and North Carolina. Those are Ind. Code §§ 27-1-4-1, 27-1-4-2, 27-1-4-9 and 27-1-4-10 (now repealed)[2] dealing with rehabilitation of insolvent insurers, and N.C. Gen Stat. § 58-155.69(6), a part of the statute pursuant to which the NCGA was created. The Appendix to the Respondents' Brief In Opposition contains additional portions of the insurance laws of North Carolina dealing with deposits, insolvency proceedings and the powers and duties of the NCGA.

---

[2] The old rehabilitation, liquidation and conservation chapter of the Indiana Insurance Law, of which the cited sections were a part, was repealed by the 1979 Indiana General Assembly, Public Law 255. It was replaced by the new Ind. Code §§ 27-9-1-1 *et seq.*, effective September 1, 1979. The UNAC rehabilitation proceeding was governed by the old statute, which in these respects is not significantly different from the new statute.

STATEMENT OF THE CASE

The Parties. The petitioner, UNAC, is an Indiana stock insurance company. Until August 5, 1974, it was licensed to do business in 45 states, including North Carolina. In 1973 UNAC had deposited a bond with the North Carolina Insurance Commissioner in the face amount of $100,000 for the benefit of North Carolina policyholders (J.A. 7-12; R. 35, Ex. Bd. 345[3]). This was required by the North Carolina Commissioner of Insurance in order to maintain UNAC's license to do business in that state. The bond has remained in North Carolina ever since (R. 37, 24).

The respondent NCGA is a creature of North Carolina statute. A guaranty association—a relatively recent development in most states—is a mechanism whereby all insurance companies doing business in a given state become ultimately responsible to fulfill policy obligations of any of them that becomes insolvent or otherwise fails to honor its policies. As explained below, UNAC's rehabilitation reduced UNAC's liabilities on its insurance policies as originally written. As a result, the NCGA became contingently liable to complete those obligations to North Carolina policyholders.

The other two respondents are state officials of North Carolina. They were named as defendants in the North Carolina lawsuit, but UNAC submits they have no interest in this dispute except as stakeholders of UNAC's deposit.

The Indiana Rehabilitation Proceeding (1974-1977). On August 5, 1974, at the request of the Indiana Department of Insurance pursuant to the Indiana Insurance Law,[4] UNAC

[3] References to the Record and to the separately paginated Exhibit Binder from the North Carolina Court of Appeals will be made by "R." or "Ex. Bd." followed by the page number. The Exhibit Binder contains the numerous exhibits attached to five affidavits filed in the North Carolina trial court as a part of that court's summary judgment proceedings. The texts of the affidavits are in the Record itself. When referring to a particular exhibit, UNAC will cite to the page of the Record where the affidavit begins, followed by the page of the Exhibit Binder where the exhibit begins.

[4] Ind. Code §§ 27-1-4-1 and 2 (Pet. App. 42A-44A).

became the subject of an Order of Rehabilitation (J.A. 13) in a statutory rehabilitation proceeding in an Indiana state court ("Indiana Rehabilitation Court" or "Indiana Court"). In oversimplified terms, UNAC's reserves were believed inadequate to meet its future policy obligations (J.A. 17, 46-47). The Indiana Insurance Commissioner was appointed "Rehabilitator" by the Indiana Court as the Indiana statute required. Notice of this action was immediately given to all state insurance commissioners, including the North Carolina Commissioner, who in turn advised the NCGA by letter dated the next day (R. 23, Ex. Bd. 24). Although at this stage it was not a party to the Indiana rehabilitation proceeding, the NCGA was kept abreast of developments in the proceeding (R. 23, Ex. Bd. 24-26; R. 30, Ex. Bd. 59). From August 5, 1974, until February 4, 1977, when UNAC was released from rehabilitation, by the terms of the Indiana statute and the Order of Rehabilitation, the Indiana Commissioner as Rehabilitator had "possession of the property" and was to "conduct the business" of UNAC including the administration of UNAC's over 50,000 outstanding policies scattered around the United States and several foreign countries.

Under the Indiana Insurance Law,[5] the Rehabilitator also had the obligation to take steps, with Court approval, toward the "removal of the causes" of the insolvency or to liquidate the company. That general mandate to the Insurance Commissioner is found in the insurance insolvency statutes of virtually all states. UNAC's policies were in large part disability income insurance policies (treated as a species of life insurance under the laws of Indiana and most other states) in which the insureds were high income professionals including a large block of airline pilots. In view of this rather unusual portfolio, it was likely many insureds might find it difficult or impossible to obtain insurance coverage elsewhere. As a result, the Indiana Commissioner concluded

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[5] Ind. Code § 27-1-4-2(a) (Pet. App. 43A).

that rehabilitation rather than liquidation was desirable. UNAC's policies were unusual in two other respects apart from the character of the policyholder group. First, most policies were "noncancellable," *i.e.*, they were renewable under the same terms, including the amount of the premium, regardless of experience. Second, many had a "return of premium rider" ("RPR") whereby the policyholder was entitled to a refund of 80% of the premiums paid if no disability claims were asserted in a ten-year period.

Work commenced on a "Plan of Rehabilitation"—in substance, a restructuring of UNAC's liabilities very similar to a reorganization of a general business corporation under federal bankruptcy laws. Ultimately, a Plan of Rehabilitation ("Plan") was entered as a part of a judgment ("Final Judgment") of the Indiana Rehabilitation Court (J.A. 37).[6] The essence of the Plan included (a) elimination of RPR benefits and (b) converting the noncancellable policies to "guaranteed renewable," *i.e.*, the policy was renewable at the policyholder's option but the company could increase the premium. The policies were converted to participating policies to return to the policyholders any profits from increased premiums.New management was installed and UNAC's shares were placed in a voting trust under Court appointees, with the requirement that the company be mutualized if certain financial commitments to policyholders were not met within ten years. UNAC was released from rehabilitation on February 4, 1977 (J.A. 120).

The policyholders of UNAC were subject to the jurisdiction of the rehabilitation proceeding in two respects. First, as creditors of (and contracting parties with) UNAC, their rights were subject to adjustment by a plan of rehabilitation.

[6] The Plan as issued on November 22, 1976, was amended in certain minor respects not relevant here, prior to final printing and mailing of the Final Judgment and Plan to interested parties in June of 1977. The Joint Appendix, pp. 37-81, contains the Indiana Court's Final Judgment, its memorandum and the Plan, but does not contain the voting trust (R. 30, Ex. Bd. 236-45) also approved by the Indiana Court.

Second, the policyholders as a class had sued UNAC in multiple forums. Shortly after UNAC was placed in rehabilitation, the Indiana Rehabilitation Court ordered that all claims be prosecuted in that Court. Several actions were stayed by the state and federal courts in which they were pending. The named plaintiffs in two of those suits (originally filed in federal district court in Virginia and state court in Illinois) intervened in the UNAC rehabilitation proceeding. *See generally*, J.A. 15-16, 47-48, and 77-80.

Indiana trial court rules are the same as the Federal Rules of Civil Procedure as they relate to class actions. In 1975 the Indiana Rehabilitation Court conditionally certified all intervening named plaintiffs as class representatives of all UNAC policyholders. A notice (J.A. 15) pursuant to Indiana Trial Rule 23(C) was sent to all policyholders (R. 30, Ex. Bd. 106). It advised them, among other matters, that:

> "The named representatives of the policyholder class, all airline pilots who are holders of disability income policies, initially brought two independent class actions against UNAC. *Schultz v. UNAC* was filed on August 2, 1974, in the Circuit Court of Cook County, Chicago, Illinois, and was subsequently removed to the United States District Court for the Northern District of Illinois. *Honeycutt, et al. v. UNAC* was filed on August 8, 1974, in the United States District Court for the Eastern District of Virginia. The complaints in those actions alleged that UNAC had misled the named policyholder representatives and other members of the class as to the overall economic conditions of the corporation and as to the extent these policies were actuarially sound. They further alleged that these misrepresentations were accomplished, among other means, by a vigorous advertising campaign and through letters to individual policyholders and that, as a result, the company was unjustly enriched. Both of these actions (along with other

litigation based on the same or similar claims) have been stayed by order of the judge in the rehabilitation proceeding. The named class representatives thereafter filed petitions to intervene on behalf of themselves and the class in these rehabilitation proceedings. They have been conditionally determined to represent as intervenors, the class of all UNAC present and former policyholders.

"Any judgment whether favorable or not which may be entered in this action will be binding upon each member of the intervening class who does not request exclusion pursuant to Rule 23(b)(3). Any class member who wishes to be excluded from the class may do so by filing with the Clerk of the Superior Court of Marion County, Room No. 5, Indianapolis, Indiana, a written request for exclusion which must be received by the Clerk on or before January 15, 1976. Any person so requesting exclusion will not participate in any recovery on behalf of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. *As a policyholder, however, he may be bound by a judgment affecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding.* Any policyholder, whether or not he requests exclusion, may as he desires, enter an appearance through his own counsel. Each member of the class not requesting exclusion, whether or not he enters such an appearance will be bound by any judgment in this proceeding." (Emphasis supplied.)

In 1976, a proposed plan was developed after elaborate actuarial analyses of UNAC's unusual portfolio of policies (R. 30, Ex. Bd. 71). Additional groups with potential or actual claims against UNAC, including state guaranty associations

and their insurance commissioners, were given notice of the then current version of the Indiana Insurance Commissioner's proposed plan of rehabilitation. Many groups (agents, creditors, policyholders, shareholders) had already intervened as parties to the rehabilitation proceeding and had participated in the multilateral negotiation that produced the proposed plan. More entered the proceedings after the proposed plan was published. In particular, among many others, the NCGA intervened on June 8, 1976 (R. 30, Ex. Bd. 98). Prior to that time, the NCGA with other affected state guaranty associations[7] had already entered into negotiations with the Rehabilitator as to the terms of the plan that related to guaranty associations.

After those extensive negotiations, modifications to the proposed plan were agreed to by the guaranty associations and the Indiana Insurance Commissioner as Rehabilitator of UNAC (R. 30, Ex. Bd. 103-05) and were incorporated into the Rehabilitator's proposed plan. The proposed plan was approved by the Indiana Rehabilitation Court for distribution to the policyholders on July 19, 1976, after a hearing at which the NCGA was present and participated (R. 30, Ex. Bd. 114). In August, 1976, the Rehabilitator mailed detailed information about the status of the rehabilitation proceeding to all interested persons, including policyholders and the NCGA (R. 30, Ex. Bd. 136-88). The North Carolina Insurance Commissioner and all other affected commissioners were also sent copies. The mailing included (a) a detailed notice of a final hearing scheduled for October 14, 1976 (J.A. 21-25), (b) a copy of a tentative rehabilitation plan for UNAC (R. 30, Ex. Bd. 175, 117-32), with appropriate cover letters to the various groups, and (c) in the case of policyholders, a data sheet describing the policyholder's policy and the amounts the

[7] Only eight state guaranty associations were affected by UNAC's rehabilitation. Several states had no guaranty association at the time. Other state guaranty associations were not involved because the particular types of insurance UNAC wrote—principally professional disability insurance—were not subject to their guaranty association laws.

policyholder would receive under the tentative plan. Anyone desiring to object to any aspect of the plan was advised as to the procedure to be followed (J.A. 23). The notice and the tentative plan specifically stated that all claims against UNAC would be compromised and settled if the Indiana Court approved that plan after the hearing. The important features of the tentative plan—elimination of RPR benefits, continued guaranteed renewable insurance coverage, possible mutualization and potential recovery from former management—affected all disability income policyholders in the same manner. Submission of the plan to appropriate authorities in the United Kingdom and Canada was contemplated (R. 30, Ex. Bd. 130).

The tentative plan treated all assets of UNAC, wherever held, as general assets of the company. All calculations of assets of UNAC were made based on "statutory" accounting. This is a form of accounting prescribed by state law for insurance companies. Insurance companies are required by the law of every state to file annual financial information with the insurance department of each state in which they do business. These are required to be on a uniform form—called an "annual statement" or "convention blank" in the jargon of the industry—prescribed by the National Association of Insurance Commissioners ("NAIC"). *See, e.g.*, Ind. Code § 27-1-3-13, and N.C. Gen. Stat. § 58-21. Among the requirements of the NAIC form is a separate listing of the insurer's deposits in each state, and an itemized listing of all portfolio securities. Deposits are listed on page 18 of the convention blank under a schedule requiring listing of "all deposits made with any Government, Province, State, District, County, Municipality, Corporation, firm or individual***." These same assets are also listed by type of asset. As a result, the North Carolina bond involved here was also included in the convention blank on the schedule entitled: "Schedule D Part 1 Showing all BONDS owned December 31 of Current year" (capitalization in original form). The total of these bonds on Schedule D is then included on line 1 of the "assets" column

on page 2 of the form that sets forth the insurer's balance sheet.[8] The net of this is that UNAC's North Carolina deposit—together with all other deposits—was included in all calculations of the company's liquidation value, etc., in the formulation of the proposed plan, just as any other asset of UNAC, and any policyholder eventually electing to receive liquidation value received a check that included his proportionate share of the North Carolina bond along with everything else. The obverse is also true. The deposits in Indiana, Virginia and elsewhere were treated as assets of the company standing behind its reserves for all policyholders including the North Carolina policyholders who elected to remain with the rehabilitated company (Pet. App. 36A).

On October 12, 1976, the NCGA and the seven other guaranty associations filed a pleading entitled "Information to the Court and Petition for Approval of Mailing to Certain Policyholders of UNAC and Approval of Concept of Service Contract Between Guaranty Associations and UNAC" (J.A. 27). The guaranty associations asked the Indiana Rehabilitation Court to approve a form letter to policyholders in the eight guaranty association states and to approve the concept of a post-rehabilitation service contract between UNAC and each of the guaranty associations. The guaranty associations' request was granted by the Indiana Rehabilitation Court (R. 30, Ex. Bd. 271).

After a hearing on October 14, 1976, at which the NCGA was present and participated, the Indiana Rehabilitation Court issued its Final Judgment, which included the final Plan, on November 22, 1976 (J.A. 37). The Plan was substantially the same as the tentative plan except that (a) certain creditors were ordered to be paid notwithstanding the

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[8] Pages 2 and 18 of UNAC's 1974 annual statement filed with the North Carolina Insurance Commissioner were among the items specifically given to the NCGA by the North Carolina Commissioner in March of 1975 when he "activated" the NCGA (R. 23, Ex. Bd. 26).

Rehabilitator's proposal to the contrary, (b) changes were made in the mechanism for ultimate control of the board of directors of the company, and (c) the Plan contemplated implementation as to United States policyholders even though the ultimate outcome as to policyholders and assets in the United Kingdom and Canada was not yet resolved. A letter (J.A. 83) from the Indiana Insurance Commissioner in December, 1976, to all policyholders advised them of these modifications. A copy went to all state insurance commissioners and others (R. 30, Ex. Bd. 246). The Final Judgment and the Plan acknowledged that amounts held outside the United States might not be able to be recovered and included a calculation that assumed that those assets might be applied only to United Kingdom and Canadian policyholders (J.A. 41, 77). Canada ultimately accepted the Plan after a proceeding in Canadian courts to bind Canadian policyholders as a matter of Canadian law, but the United Kingdom situation remains unresolved (J.A. 112-15).

The Plan effected substantial changes in UNAC's contractual relationships with its policyholders, agents and creditors, and required UNAC's common stock to be placed in a voting trust (R. 30, Ex. Bd. 236-45) whose trustees were appointed by the Indiana Rehabilitation Court. Policyholders were given the option of receiving the liquidated value of their policies or continuing their policies with UNAC with reduced benefits and at increased premiums. The Final Judgment and the Plan, among many other items (a) expressly found that the Indiana Court had jurisdiction over all policyholders and their respective guaranty associations (J.A. 38), (b) compromised each policyholder's claims against UNAC whether or not the policyholder was a member of a Rule 23 certified class (as all North Carolina policyholders were) (J.A. 38-40, 77-81), (c) provided that after the specified Court directed changes in the obligations between UNAC and each of the guaranty associations, "UNAC shall have no further obligation or liability to any guaranty association" (J.A. 73-74), and (d) provided that the Indiana Court would retain

continuing jurisdiction to deal with the interpretation, implementation and necessary future modification of the Plan (J.A. 42-43). No appeal was taken from the Indiana Rehabilitation Court's 1976 Final Judgment.

In June of 1977, the last mass mailing to policyholders, shareholders, insurance commissioners, agents and others was made (R. 30, Ex. Bd. 292). That mailing included the Indiana Rehabilitation Court's Final Judgment and Plan. UNAC has now implemented the Plan in all states of the United States and in Canada and has resumed possession of its property and the conduct of its business as a privately operated Indiana stock insurance company. UNAC is not (and was not at any time after February 4, 1977, when the rehabilitation proceeding terminated) in default of any policyholder contracts as those contracts were revised by the Indiana Rehabilitation Court (Pet. App. 37A).

The NCGA's Post-Rehabilitation Petition (June 1977). On June 8, 1977, UNAC and the eight guaranty associations, including the NCGA, filed in the Indiana Rehabilitation Court a "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations" (J.A. 89). By their joint petition, UNAC and the guaranty associations asked the Indiana Court for permission to execute a Service Contract in the form attached to the petition. On June 14, 1977, the Indiana Rehabilitation Court directed UNAC and each of the guaranty associations to execute and carry out the form Service Contract (R. 30, Ex. Bd. 291). Basically, the Service Contract provided for UNAC to continue to administer the insurance policies of policyholders residing in guaranty association states and to receive a service fee for doing so. The guaranty associations (rather than the policyholders) were to pay UNAC any future premium increases. The guaranty associations were to pay directly to policyholders any policy benefits, such as RPRs, which were cancelled by the Plan.

The North Carolina Lawsuit (January 1978). The other seven guaranty associations abided by the Indiana Rehabilitation Court's Order of June 14, 1977, approving the form Service Contract. In October 1977 the NCGA submitted for UNAC's signature a copy of the form of Service Contract (which it had itself petitioned the Indiana Rehabilitation Court to approve) signed by the NCGA but altered to add a new paragraph on the last page which said rights in the deposit would be governed by North Carolina law. (R. 23, Ex. Bd. 34; R. 36). UNAC responded (R. 23, Ex. Bd. 35) in the following terms:

> "Enclosed is a signed copy of the Service Agreement between Underwriters National Assurance Company and North Carolina Life and Health Insurance Guaranty Association. As you know, this agreement is entered into pursuant to the Plan of Rehabilitation of UNAC that has been approved by the Indiana courts.
>
> "The purpose of this letter is to set forth UNAC's understanding that the last paragraph in the form of agreement beginning 'It is expressly agreed, however,' is designed simply to recite that neither the Guaranty Association nor UNAC has waived any claims that it may have in connection with the North Carolina deposits. You should understand that UNAC takes the position that the Guaranty Association has no claims to the deposits. In particular, UNAC's Plan of Rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. That Plan has been approved by the Indiana courts and, as a matter of full faith and credit under the federal constitution, is now binding under North Carolina law as well. Please advise us if the Guaranty Association has any different view. As we understand it, the last paragraph was inserted by

> the Guaranty Association simply to preserve whatever rights it may have had after the implementation of the Plan, and we have executed the enclosed agreement and returned it to you with that understanding.
>
> "Thank you for your cooperation."

The NCGA then filed this case in January of 1978 in a North Carolina state court naming UNAC and the North Carolina Insurance Commissioner and Treasurer as defendants. The complaint (J.A. 99) sought to obtain for the benefit of the NCGA, as claimed assignee of the rights of North Carolina policyholders, the $100,000 deposit made by UNAC in North Carolina in 1973. The North Carolina Insurance Commissioner and Treasurer, though nominal defendants in the lawsuit, filed a cross-claim against UNAC seeking the same sort of relief requested by the NCGA (R. 8). UNAC answered and raised its federal constitutional defenses (J.A. 105; R. 12).

The Indiana Petition for Instructions (July 1978). After the North Carolina lawsuit was filed, UNAC was faced with the prospect of having to make payments to the NCGA under the Service Contract at the same time that, in UNAC's view, the NCGA claimed rights to the bond in derogation of the orders of the Indiana Rehabilitation Court and the rights of policyholders outside North Carolina. As a result, UNAC filed a Petition for Instructions with the Indiana Rehabilitation Court on July 13, 1978 (J.A. 111). Notice of the petition and of the Indiana Rehabilitation Court's setting of a hearing was given to the parties to the UNAC rehabilitation proceeding, including the NCGA, and to the North Carolina officials (Pet. App. 37A; J.A. 121-22; R. 30, Ex. Bd. 329). The hearing was held on September 20, 1978, before the Indiana Rehabilitation Court. The issue was the effect of the Plan on the rights of North Carolina policyholders in the deposit. Both the NCGA and UNAC appeared (Pet. App. 32A).

On November 22, 1978, an Order (Pet. App. 31A-41A) was

entered by the Indiana Rehabilitation Court providing, *inter alia:*

> "2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.
>
> "3. The insertion by the North Carolina Association of the last paragraph on page 8 of the Service Contract was not authorized by the Court and is a violation of the Court's Order of June 14, 1977. Any attempt by the North Carolina Association or any other person to circumvent the provisions of the final Order, the Plan, or other orders of the Court, or to obtain any preference or special right in the assets of Underwriters, as fully adjudicated by the final Order and the Plan, is a violation of the orders of this Court to be dealt with by the Court."

That Order has been appealed by the NCGA to the Court of Appeals of Indiana. The case is fully briefed, but no appellate decision has as yet been rendered and a stay has now been entered pending disposition of this case by this Court.

Proceedings in the North Carolina Courts (1978-1980.) After the Indiana Rehabilitation Court had thus spoken a second time on the subject of UNAC's North Carolina deposit, the NCGA and the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment in the North Carolina state court action (J.A. 123). UNAC filed a cross motion for summary judgment (J.A. 127). North Carolina procedure with respect to summary judgment motions is the same as that provided by Rule 56 of the Federal

Rules of Civil Procedure. Affidavits and briefs were submitted by both sides and a hearing was held in the North Carolina state court on March 19, 1979. UNAC raised its *res judicata* and full faith and credit defenses in its answer to the North Carolina complaint and cross-claim, and also affirmatively asserted those defenses in support of its motion for summary judgment (Ex. Bd. 394-448).

There were no disputed factual issues presented by the cross-motions. The entire record consisted of the affidavits submitted with respect to the motions. No one suggested in the trial court that the North Carolina officials had any beneficial interest in the deposit. The officials' answer and cross-claim (R. 8) against UNAC affirmatively alleged that the deposit was held "for the sole protection of North Carolina contract holders and policyholders." The only relief requested by the officials was that the North Carolina Commissioner be designated liquidator if the deposit was to be liquidated.

On April 11, 1979, the North Carolina trial court entered summary judgment for the NCGA (Pet. App. 19A). That order held that despite the contrary rulings of the Indiana Rehabilitation Court in 1976 and 1978, UNAC's North Carolina deposit could be applied to meet pre-rehabilitation obligations of UNAC to North Carolina policyholders (Pet. App. 26A-27A).

UNAC appealed to the North Carolina Court of Appeals, raising again its constitutional and statutory defenses. In an opinion dated September 2, 1980 (Pet. App. 5A), the Court of Appeals affirmed the decision of the North Carolina trial court. The North Carolina Court of Appeals held that the Indiana Rehabilitation Court did not have the necessary personal jurisdiction over the North Carolina Insurance Commissioner and Treasurer to adjudicate this deposit, and that since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding.

On October 6, 1980, UNAC timely filed a Notice of Appeal and Alternative Petition for Discretionary Review in the Supreme Court of North Carolina, raising again its constitutional and statutory defenses, as well as pointing out the interstate commerce implications of the North Carolina Court of Appeals' interpretation of North Carolina law. By judgment entered on December 4, 1980 (Pet. App. 1A), the North Carolina Supreme Court let the opinion of the North Carolina Court of Appeals stand.

SUMMARY OF ARGUMENT

1. *The Plan Barred All Pre-Rehabilitation Claims.* It is clear that the Final Judgment and Plan entered by the Indiana Rehabilitation Court in 1976 intended to "compromise and settle" the rights of all policyholders against UNAC (J.A. 38-42, 62, 80-81). It is equally clear that all policyholders were told that this would be the result in the 1975 rehabilitation and class action notice (J.A. 16-17), in the 1976 notice of hearing (J.A. 24-25), in the late 1976 mailings from the Indiana Insurance Commissioner and policyholder class counsel (J.A. 83-87), and in the June, 1977, mailing of the text of the Indiana Rehabilitation Court's Final Judgment and Plan. Each North Carolina policyholder elected to continue coverage under his policy and each paid his premiums and received benefits from UNAC since 1976 in accordance with the policy. In view of the multiple mailings and hearings and the abundant information given to all interested persons, the procedural due process rights of policyholders and others were fully protected.

2. *The Rehabilitation Court Had Jurisdiction to Bar All Policyholders' Claims.* The Indiana Rehabilitation Court had jurisdiction over the subject matter by virtue of its being a trial court of general jurisdiction to which the Indiana legislature granted jurisdiction to rehabilitate insolvent Indiana insurance companies. It also had three separate bases of jurisdiction to adjudicate the claims of the policyholders against UNAC whether that jurisdiction is viewed as *"in*

personam," "*in rem*" or something else. First, it had jurisdiction over the claims of the policyholders because they entered into a contract of insurance with an Indiana insurance company that included, as a matter of law, a consent to an Indiana rehabilitation action in the event of the insurer's insolvency. The Indiana Court also had *in rem* jurisdiction over all claims by and against UNAC—as opposed to the assets that might satisfy those claims—under well settled principles that entitled the Court to adjudicate those claims. Third, the North Carolina policyholders, by their representatives, were plaintiffs in the Indiana Rehabilitation Court. They were given notice of their representation and failed to "opt out." They also were given a notice of the Plan as a proposed settlement of their claim and an opportunity to be heard. And they in fact received and continue to receive the benefits of the Plan. Under these circumstances they are bound by the Plan under class action doctrines.

3. *The North Carolina Officials Make No Difference.* The North Carolina officials have no interest in the deposit except to see that it is maintained in the state, as it is, to secure any future breach of UNAC's obligations to policyholders. There is no present breach and the officers have no claim. As a result, their absence as parties from the Indiana proceeding is irrelevant. Moreover, they could not be required to appear in the Indiana action, and declined an invitation to appear voluntarily. They received notice of the Indiana proceeding and that is enough. Any doctrine of North Carolina law that precludes adjudicating the rights of the policyholders *viz a viz* UNAC in a court of a sister state is an unconstitutional burden on interstate commerce.

4. *The NCGA is Barred From Relitigating Any Aspect of This Suit.* The NCGA is the only North Carolina party with any interest in the outcome of this suit. If the deposit can be seized for its benefit, the NCGA gains; if not, its obligations to the North Carolina policyholders—and the policyholders' rights

to their policy benefits—are unaffected. The policyholders simply have no interest in the resolution of this dispute. Any claim NCGA may have to the deposit is solely by assignment of or subrogation to the rights of the North Carolina policyholders whose policies it guarantees. When the Indiana Rehabilitation Court entered its 1976 Final Judgment and released UNAC from rehabilitation, that order fixed the rights and obligations of UNAC, the policyholders and the NCGA. The policyholders are bound by the Plan and UNAC is not in default of any current obligations to them. As a result, they have no claim against UNAC's deposit. Because the policyholders have no claim, the NCGA has no claim. Finally, the NCGA was a party to both the 1976 and the 1978 Indiana proceedings, and it is bound by the result of both. As such, it cannot relitigate either the Plan or the question whether it and/or the policyholders are bound by the Plan. Both the 1976 Plan and the 1978 Order of the Indiana Court are given *res judicata* effect in Indiana and, therefore, are entitled to full faith and credit in the courts of North Carolina. Accordingly, when faced with the cross motions of UNAC and the NCGA for summary judgment on the undisputed facts, the North Carolina courts were obliged to enter judgment for UNAC.

ARGUMENT

I.

THE INDIANA REHABILITATION COURT HAD JURISDICTION TO ALTER THE POLICYHOLDERS' RIGHTS AGAINST UNAC

A. Fundamental Policy And Established Insurance Doctrine Support Jurisdiction

This case involves an insurance company reorganization. The Bankruptcy Code does not apply to insurance companies. 11 U.S.C. § 109(b). Rather, the problems of insolvent insurers are relegated to state law, which has long regarded insurance as of particular public concern subject to unusual if not

unique doctrines.[9] Because of the complexities involved in insurance policies insurance accounting, and the actuarial considerations they entail, for better or worse, state insurance commissioners have been vested with the duty and authority to protect the policyholders' interests. In contrast to the reliance on full disclosure that underlies the securities laws and many consumer laws, state legislatures have generally elected to give the insurance commissioners broad discretion to take appropriate steps to protect the interests of the policyholders as a group, particularly in the event of an insurance company's insolvency. It is well settled that:

> "***[T]he power of the insurance commissioner with respect to statutory proceedings against insolvent or delinquent insurers is of general public concern, and contract and property rights must yield thereto."

2 *Couch On Insurance 2d* § 22:16, at 681 (1959). *In accord, Caminetti v. Pacific Mutual Life Insurance Co. of Cal.*, 22 Cal.2d 344, 139 P.2d 908, 917 (1943). In most opinions concerning rehabilitation proceedings, there are similar statements to the effect that the insurance industry so affects the public interest that the state has the power to regulate the industry and provide for rehabilitative measures through the insurance commissioner under the police power. *See e.g., Bolton v. Progressive General Insurance Co.*, 85 Ill.App.2d 427, 229 N.E.2d 350, 351 (1967); *Kueckelhan v. Federal Old Line Insurance Co.*, 69 Wash.2d 392, 418 P.2d 443, 452 (1966); and *Dirks v. Capitol Security Life Insurance Co.*, 84 S.D.595, 174 N.W.2d 212, 213 (1970). As a corollary, the insurance commissioner has broad discretion in devising a plan of rehabilitation:

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[9] *California State Auto. Association Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951). As noted in footnote 2, 341 U.S. at 109, state regulation of insurance has withstood due process challenges in a wide variety of contexts over the years. *See also* the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015, in which the Congress explicitly deferred to state regulation of the business of insurance.

> "The primary duty impressed by the statute upon the Commissioner in a rehabilitation proceeding is to correct or remove the causes and conditions which have made the rehabilitation proceeding necessary and, if possible, to conserve and restore the company to a viable status for the benefit of the policyholders. Toward this end he must be afforded that freedom of action in the overall management of the company which will permit him to knowledgeably evaluate, plan, devise, and implement a program which in his best judgment and in keeping with his expertise in the field of insurance will accomplish the objective of the proceeding. ***"

Kueckelhan v. Federal Old Line Insurance Co. (Mut.), 74 Wash.2d 304, 444 P.2d 667, 674 (1968).

The UNAC Plan, complex as it is, evidences an effort by the Indiana Insurance Commissioner to give priority to the interests of the policyholders as a group with primary emphasis on providing continued insurance coverage for those who need it. One essential element of any reorganization of an impaired business entity—insurer or not—is that the plan be given finality in order that the revived entity knows where it stands. Attainment of that objective is plainly an appropriate objective of an insurance commissioner who inherits a failing insurer. Consequently, numerous decisions in this Court and in the state courts recognize the power of a court-approved plan to adjust all types of claims against the insurer. *See, e.g., Neblett v. Carpenter*, 305 U.S. 297 (1938), *affirming Carpenter v. Pacific Mutual Life Ins. Co. of Cal.*, 10 Cal.2d 307, 74 P.2d 761 (1937) (policyholders); *In re American Investors Assurance Co.*, 521 P.2d 560 (Utah 1974) (shareholders); *People v. Peoria Life Ins. Co.*, 376 Ill. 517, 34 N.E. 829, *cert. denied*, 314 U.S. 688 (1941) (agents).[10]

[10] *See also Liberty Nat'l Ins. Co. v. Reinsurance Agency, Inc.*, 307 F.2d 164

(Footnote continued on following page)

Some of the policy considerations in support of state court jurisdiction noted by this Court in *World-Wide Volkswagen Corp. v. Woodson*, ____ U.S. ____, 100 S.Ct. 559 (1980), are particularly persuasive here. The forum state (Indiana) has a very strong interest in adjudicating claims against an insolvent insurer because its own state officials are charged with trying to clean up the mess. *Cf. Feldman v. Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976) (action to compel a corporation with shareholders in many states to convert its preferred shares to common is proper only in the state of incorporation which has the greatest interest). The interest of judicial efficiency in dealing with the affairs of an insolvent multistate insurer also strongly supports jurisdiction in the state of domicile. *Cf. World-Wide Volkswagen, supra*, 100 S. Ct. at 564; Fraser, *Jurisdiction By Necessity—An Analysis Of The Mullane Case*, 100 U. Pa. L. Rev. 305 (1951). And, in the terms used by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Kulko v. Superior Court*, 436 U.S. 84 (1978), every policyholder had every reason to expect to be "haled into court" in Indiana in the event UNAC became insolvent. Indeed, that is precisely what Indiana law and standard insurance doctrine prescribe: the domiciliary state is responsible for dealing with an insurer's financial difficulties. 2 *Couch On Insurance 2d* §§ 22:10 and 22:11 (1959); 19 Appleman, *Insurance Law And Practice* § 11001 (1946), and § 11031 (1979 Supp.). Moreover, there is no other court that could entertain all claims by and against UNAC. This consideration strongly supports jurisdiction of the Indiana court. Von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1162 (1966). And the jurisdiction asserted is, solely to adjudicate

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continued

(9th Cir. 1962); *National Surety Corp. v. Nantz*, 262 Ky. 413, 90 S.W.2d 385 (1936); *Hutchins v. Pacific Mut. Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938); *Morris v. Investment Life Ins. Co. of America*, 1 Ohio App.2d 330, 204 N.E.2d 550 (1965); *Neblett v. Pacific Mut. Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802 (1944).

rights arising from the policyholders relationship to the insurance company; no general jurisdiction over the policyholders is claimed.

Under these circumstances, the issue presented is whether the Indiana Rehabilitation Court had the power to adjust the rights of North Carolina policyholders even as to claims they may have asserted—but did not assert prior to the Final Judgment and Plan—against a deposit in that state. UNAC submits that there were three separate bases for that power in the Indiana court, any one of which was sufficient.

B. The Policyholders As Such Are Subject To The Indiana Rehabilitation Court's Jurisdiction

Every policyholder entered into a contract with UNAC. UNAC, as an Indiana insurer, carries with it in each state in which it does business, the Indiana Insurance law, the provisions of which provide for rehabilitation by the Indiana Commissioner in an Indiana court (Pet. App. 42A-45A). That notion is reflected in decisions of this Court of over 100 years standing.[11] It can be viewed as "consent" as a matter of law,[12] or as jurisdiction by representation or simply as a matter of "jurisdiction by necessity."[13] It is grounded in the very practical point that if the state of domicile cannot bind all policyholders, there is no realistic means of rehabilitating an insolvent insurer. And there is nothing "unfair" about requiring all creditors of an insolvent insurer to submit to the

[11] *Relfe v. Rundle*, 103 U.S. 222 (1880); *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947). *In accord*, 19 Appleman, *Insurance Law And Practice* § 11001, at 570 (1946).

[12] Similarly, courts of the state of domicile of a mutual assessment association or corporation have jurisdiction to assess the members or shareholders in other states and this Court has required courts in non-domiciliary states to give full faith and credit to decisions made by courts in the state of domicile. *See, e.g., Bernheimer v. Converse*, 206 U.S. 516 (1907); *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917).

[13] Fraser, *Jurisdiction By Necessity—An Analysis of the Mullane Case*, 100 U. Pa. L. Rev. 305 (1951), cited with apparent approval in *Hanson v. Denckla*, 357 U.S. 235, at 246 n. 13 (1958).

jurisdiction of a single court; indeed, it is fundamentally unfair to deny the insurer and its creditors a unified forum in which to attempt to work the matter out.

As put by the Eighth Circuit in affirming the dismissal of a Missouri suit against an insurer in liquidation in New York:

> "* * * Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. * * *"

Motlow v. Southern Holding & Sec. Corp., 95 F.2d 721, 725 (8th Cir. 1938).

This Court's holding in *Neblett v. Carpenter*, 305 U.S. 297 (1938), sustained a plan very similar to UNAC's against a challenge that it violated the federal constitutional prohibition against state impairment of contracts. However, the Court plainly assumed that the Pacific Mutual plan, if sustained, would be binding on policyholders in other states. Subsequently, courts in several states squarely held the very same plan binding on policyholders outside the state of domicile. Cases specifically rejecting collateral attacks on insurance reorganizations on the basis that the judgment of the rehabilitation court is entitled to full faith and credit include *Taylor v. Pacific Mutual Life Ins. Co. of Cal.*, 214 N.C. 770, 100 S.E.882 (1939); *Larson v. Pacific Mutual Life Ins. Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698 (1940); *Padway v. Pacific Mutual Life Ins. Co. of Cal.*, 42 F. Supp. 569 (E.D. Wis. 1942).[14]

[14] More generally, federal and state courts and officers must defer to domiciliary state dissolution proceedings and the rights of a statutorily-appointed insolvency receiver in the insolvent company's home state. *See Relfe v. Rundle*, 103 U.S. 222 (1880); *Converse v. Hamilton*, 224 U.S. 243

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This is not to say that the Indiana Rehabilitation Court can or should ignore claims based on deposits in other states. To the contrary, if a North Carolina policyholder had sought to seize the deposit before UNAC was released from rehabilitation, that presumably could have been done, if not in North Carolina, in the Indiana Rehabilitation Court itself. Of course, an offsetting adjustment would have been made by the Plan to eliminate the North Carolina policyholders' rights in non-North Carolina assets, just as provision was in fact made for the contingency that policyholders or assets in Canada or the United Kingdom—where the Plan was not entitled to full faith and credit—might not be bound by the Plan. But no effort was made before the Plan was adopted to set off the North Carolina deposit. As a result, the Plan shut off any future attack based on pre-rehabilitation claims.

An alternative way to express the result that the policyholders are bound is to assert that the Indiana Insurance Commissioner was a "trustee" for all creditors including the policyholders and others. *Larson v. Pacific Mutual Life Insurance Co. of Cal.*, 373 Ill. 614, 27 N.E.2d 458, *cert. denied*, 311 U.S. 698 (1940). This is correct in substance. The rehabilitation is a regulatory proceeding. Because of the inherent complexity of many aspects of insurance, the states have generally elected to rely on a regulatory agency rather than the perceived self interest of those affected. The state legislatures direct the Commissioner to act in what he perceives to be the best interests of the policyholders as a whole. This is certainly a legitimate exercise of state legislative judgment. And viewing the commissioner as the "trustee" of the policyholders is consistent with the need that a binding judgment result even if no policyholder had

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(1912); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Clark v. Willard*, 292 U.S. 112 (1934); *Commonwealth Of Pennsylvania v. Williams*, 294 U.S. 176 (1935); *Penn Gen. Cas. Co. v. Commonwealth*, 294 U.S. 189 (1935). *In accord*, *Genecov v. Wine*, 109 F.2d 265 (8th Cir. 1940); *American Cast Iron Pipe Co. v. Statesman Ins. Co.*, 343 F. Supp. 860 (D. Minn. 1972).

appeared in the proceeding. Given notice and an opportunity to be heard, the trustee's final settlement of his account is binding on all beneficiaries. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Finally, some courts speak of the *"in rem"* jurisdiction of the court over all claims by and against the insurer. *Hutchins v. Pacific Mutual Life Ins. Co. of Cal.*, 97 F.2d 58 (9th Cir. 1938). This too is consistent with the notion that a rehabilitation plan may be implemented even if no policyholder seeks to intervene.

Regardless of how one rationalizes the result in traditional jurisdictional terms ("consent," "trusteeship," or *"in rem"* jurisdiction) it is clearly correct that the state of domicile has the jurisdiction to adjust contractual rights against the insurer and to make it stick. That was done here, and it is entitled to full faith and credit in all states of the union.

C. The Policyholders, As Members Of A Plaintiff Class, Have Entered Into A Binding Settlement Agreement.

This case involves an insurance rehabilitation proceeding that binds policyholders regardless of the adequacy of representation by other policyholders, and would be binding even if no policyholder appeared as a named party. Representative theories are really irrelevant in a regulatory proceeding of this nature. Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 725 (1979). However, because several policyholders did intervene and were certified as class representatives, the policyholders are also bound under traditional class action doctrines. The class was certified as to the claims the policyholders asserted against UNAC in general. These were "common question" claims cognizable under Indiana Trial Rule 23(B)(3) identical to Federal Rule 23(b)(3). Accordingly, a class action notice of the right to opt out was sent. Because each class member of this plaintiff class had the right to "opt out" under Indiana Rule 23, the minimum contacts analysis

appropriate for personal jurisdiction over a defendant is inapplicable. Rather, as set forth in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), a state court class action may bind all members of a plaintiff class. At the very minimum that is true where the action results in a settlement that takes the form of an ongoing relationship—in this case insurance coverage—in which each class member has affirmatively elected to participate and has received benefits. *Cf.* Note, *Multistate Class Actions, supra*, at 734.

II.

PROCEDURAL DUE PROCESS WAS OBSERVED

Each policyholder was mailed a notice (J.A. 15) shortly after the class representatives were conditionally certified. The policyholder was told (a) he would be represented in the prosecution of claims against UNAC along with all other policyholders, world-wide, unless he opted out, (b) he could intervene in his own name, and (c) he would be bound by any plan of rehabilitation regardless of whether he opted out, intervened or remained a class member. After the Indiana Insurance Commissioner formulated his proposed plan, a second notice (J.A. 21) was sent, along with the complete text of the Commissioner's proposal (R. 30, Ex. Bd. 175, 117-32). This made clear what the Commissioner proposed to do to the policyholders' contracts and gave notice of the time and place of a hearing and the procedure to be followed by anyone wishing to present anything to the Indiana Rehabilitation Court. A hearing was held and the Plan (J.A. 57), modified in some respects as a result of the hearing, was adopted as a part of the Final Judgment of the Indiana Court (J.A. 37). This too was communicated to the world, first by letters from the Indiana Commissioner and policyholder class counsel (J.A. 83-87), and a few months later by the mailing of the complete text of the Final Judgment and the Plan with explanatory materials (R. 30, Ex. Bd. 292). In the case of North Carolina policyholders, they were told of the NCGA's role. Accordingly, and obviously, no North Carolina policyholder

had any incentive to object because his insurance coverage, as guaranteed by the NCGA, remained essentially intact.

As noted above, the central provisions of the Plan affected all policyholders in the same manner. There were no subclasses certified although it is obvious that to some degree holders of different policies were affected differently by the Plan. However, the same is true of persons of different ages, persons who were no longer (or might no longer be) insurable, etc. Equally true is that policyholders in various states would be in somewhat differing positions if a scramble to liquidate all of UNAC's assets, wherever found, were to ensue. But the Commissioner determined that liquidation was not in the interests of the policyholders as a whole. And that judgment is exactly the sort of judgment the Commissioner is charged by state law with making. The only issue presented to this Court is whether the procedure adopted—notice to all policyholders of the rehabilitation proposals and an opportunity to be heard—is sufficient to meet the due process requirements of the Fourteenth Amendment. The answer to that is obviously affirmative. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Indeed, no one to date has contended otherwise in Indiana, North Carolina or elsewhere. The notices given in the UNAC rehabilitation were far more elaborate than those sustained in *Morris v. Investment Life Ins. Co. of America*, 1 Ohio App.2d 330, 204 N.E.2d 550 (1965), *and Neblett v. Pacific Mutual Life Ins. Co. of Cal.*, 22 Cal.2d 393, 139 P.2d 934 (1943), *cert. denied*, 320 U.S. 802 (1944).

Once notice of the Plan and an opportunity to be heard were given, the constitutional requirements of jurisdiction were met. All subsidiary issues, e.g. how far the Plan is to spell out the precise impact on various subgroups, are simply issues of state procedural law. As to these issues, the 1978 proceeding in Indiana was the NCGA's day in court and that decision of the Indiana Court is itself entitled to full faith and credit. Equally important, no such issue is raised by the decisions below because the North Carolina courts held that Indiana

simply could not make a binding adjudication as to UNAC's rights in the North Carolina deposit regardless of the procedure used. The North Carolina trial court did include a finding (Pet. App. 21A) that no representative policyholder was from a state with a deposit, although it is unclear what significance, if any, the trial court attached to that finding. This finding is unsupported by anything in the record. It is also incorrect. Virginia residents (with Virginia counsel) were among the class representatives in Indiana, and Virginia is among the states with a deposit. Indeed, the specific page from UNAC's 1974 convention blank listing deposits in Indiana, North Carolina and Virginia among others, was called to the NCGA's attention by the North Carolina Commissioner when he activated the NCGA (R. 25; R. 23, Ex. Bd. 26). However, even if there were no intervening policyholder from a depositing state (or no policyholder from any state), the Indiana Insurance Commissioner is to devise a plan in the best interests of the policyholders as a whole which, after notice and a hearing, binds the entire group. All deposits were and are matters of public record, not only in the Indiana Rehabilitation Court, but, as explained above, in filings with every state insurance commissioner.

Finally, any theoretical claim they may have had to the deposit was wholly immaterial to the North Carolina policyholders because the NCGA stood behind UNAC's obligations. The NCGA, an association of 600 insurance companies and a party to the Indiana rehabilitation proceeding, was fully capable of evaluating the Plan's impact on it. Similarly, the North Carolina Insurance Commissioner was advised of UNAC's insolvency from the first days of the rehabilitation proceeding and promptly reported the potential liability to the NCGA (R. 23, Ex. Bd. 24-26). If resort to the North Carolina deposit were desirable[15]—and it is far from

[15] There are a number of reasons why a party with an interest in the North Carolina deposit might choose to give up that interest and participate instead in the rehabilitation in Indiana. First, the cost of administering a

(Footnote continued on following page)

clear that it was—that remedy was available up to the moment the Indiana Rehabilitation Court approved the Plan. *See, e.g., Continental Bank & Trust Co. v. Gold*, 140 F. Supp. 252 (E.D. N.C. 1956). At that moment, it evaporated.

III.
THE NORTH CAROLINA OFFICIALS MAKE NO DIFFERENCE

UNAC submits the the North Carolina officials have no interest in the deposit and for that reason their absence is irrelevant. If, however, North Carolina law seeks to create such an interest under its state law that cannot be compromised by a court of the insurer's domicile, then that effort must fail. It has long been recognized that the courts of one state vested with jurisdiction over the person of disputing claimants to property, can adjudicate that dispute even if the property is outside that state. *Riehle v. Margolies*, 279 U.S. 218 (1929); *Morris v. Jones*, 329 U.S. 545 (1947). That is what happened here. The Indiana Rehabilitation Court, in exercise of its jurisdiction to adjudicate the policyholders' claims against UNAC, did just that in 1976. The same is true of any claims the NCGA had. Then in 1978 the Indiana Court

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separate rehabilitation or liquidation in North Carolina would be substantial. That fact led the Canadian authorities to go along with the Plan, even though UNAC had a disproportionately large amount of assets on deposit in Canada and Canadian policyholders would have fared better than U.S. policyholders in a liquidation. Second, the Plan gave policyholders (and the NCGA as their assignee) certain contingent rights to recoup their losses. Those included an initial cash distribution, a share of a $2.5 million limited RPR benefit, a share in any third-party litigation recoveries, and, for the eight guaranty associations, a share of future profits. Finally, the Plan offered policyholders uninterrupted insurance coverage with UNAC. Whether the $100,000 in North Carolina could economically be run as a separate mini-insurance company insuring the approximately 30 policyholders in that state is problematic at best.

adjudicated that it had already adjudicated the claims of both the policyholders and the NCGA. If the state of North Carolina ever had any interest in the deposit, the North Carolina Insurance Commissioner was given notice of the Indiana rehabilitation proceeding and received copies of all mailings to policyholders including the notice of the proposed plan. After the North Carolina litigation was instituted, both the North Carolina Insurance Commissioner and the Treasurer were given notice of the 1978 hearing in Indiana. At no point was either official made a party to the Indiana proceeding, except to the extent that the notices made them parties, and neither voluntarily appeared. The same is true of the policyholders and creditors insofar as the proceeding was a pure rehabilitation proceeding, disregarding the fact that some policyholders did institute and ultimately compromise a class action.

Nothing more could have been done with regard to the North Carolina officials. The Court's recent opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), did not have to reach the assertion of personal jurisdiction by the trial court in one state (Texas) over government officials responsible for enforcement of the state takeover statute in a second state (Idaho). The Fifth Circuit decision upholding that jurisdiction, *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), is questionable on its facts. But even if *Kidwell* is correct on its facts, this Court's opinions in *World-Wide Volkswagen Corp. v. Woodson*, ___ U.S. ___, 100 S.Ct. 559 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978), and *Schaffer v. Heitner*, 433 U.S. 186 (1977), and the Court's other personal jurisdiction decisions since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), make clear that neither official involved in this case could have been compelled to appear in Indiana. *See also, Colorado River Water Cons. District v. Andrus*, 476 F. Supp. 966 (D. Colo. 1979); *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972); *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Idaho 1976). Unlike the policyholders, neither official

had taken any action to associate himself with UNAC or otherwise to consent to jurisdiction in an Indiana court. And neither availed himself of any benefit of Indiana law, an essential element according to *World-Wide Volkswagen, supra*. There was nothing to prevent the officials from objecting at the Indiana hearing, however. And, because the North Carolina Insurance Commissioner received the same notices as the policyholders and the same opportunity to be heard, he is equally bound by the Final Judgment and Plan. If that is not the law, then North Carolina's attempt to make its officials indispensable but unreachable parties to any effort to adopt a binding plan of rehabilitation is an unconstitutional burden on the commerce of interstate insurance, which necessarily involves assets and liabilities in many states. *Cf.* Horowitz, *The Commerce Clause As A Limitation On State Choice-Of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971).

IV.

THE NCGA IS BOUND BY THE PLAN IN ANY EVENT

The NCGA is the only North Carolina party with any interest in the deposit. It intervened as a party in the Indiana proceeding in 1976, before the proposed plan was distributed to the policyholders. It negotiated and later advocated changes in the initial proposals by the Indiana Insurance Commissioner. It participated in the hearing at which the Plan in its final form was approved. It petitioned the Indiana Court for approval of the Service Agreement and was ordered to execute the Agreement in the form attached to its petition. It sought and received authority to make a separate mailing to North Carolina policyholders explaining their unusual status in the proceeding by virtue of the NCGA's coverage as to them. In 1978 the NCGA participated in the hearing after which the Indiana Rehabilitation Court held that the Plan was binding on North Carolina policyholders and the NCGA as to the North Carolina deposit. It has appealed that Order and its appeal is pending.

Under these circumstances (a) the NCGA is bound by the Final Judgment and the Plan and (b) the NCGA is bound by the 1978 Order. Both the Plan and the 1978 Order are entitled to full faith and credit in North Carolina. The 1978 Order adversely adjudicated the issues the NCGA sought to assert in the North Carolina courts. If the NCGA wished to challenge the jurisdiction of the Indiana court to enter the Plan as a binding judgment with respect to the North Carolina deposit, the 1978 hearing gave the NCGA a full and fair opportunity to make that contention. As held by this Court in *Durfee v. Duke*, 375 U.S. 106, 111 (1963):

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that *a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.*"

375 U.S. at 111 (Emphasis supplied.) Thus the North Carolina trial court in 1979 was obliged to give full faith and credit to the 1978 decision of the Indiana Rehabilitation Court. *Cf. Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931) (order of one federal district court denying motion to dismiss for lack of personal jurisdiction is *res judicata* as to that issue in subsequent action to enforce the judgment).

The fact that an appeal is pending from the 1978 Order is irrelevant. Both federal and Indiana law hold that a trial court decision is entitled to *res judicata* effect notwithstanding the pendency of an appeal. IB *Moore's Federal Practice* ¶0.416[3] (1974); *In re Estate of Nye*, 157 Ind.

App. 236, 299 N.E.2d 854, 865 n. 22, *pet. for reh. overruled*, 157 Ind. App. 236, 301 N.E.2d 786 (1973). Because 28 U.S.C. § 1738, implementing the full faith and credit provision of the Constitution, requires the judgment to be given the same effect in the forum state (North Carolina) as it receives in the state of origin (Indiana), Indiana *res judicata* law controls. However, North Carolina law is in accord. *Armfeld v. Moore*, 44 N.C. 157 (1852); *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957); *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). As a result, even if the 1978 Order were incorrect (which it is not), it is *res judicata* and must be followed by the North Carolina courts. *American Express Co. v. Mullins*, 212 U.S. 311, 312 (1909); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915).

The NCGA is the party at whose instance and for whose benefit the North Carolina courts ordered UNAC's deposit liquidated. As the North Carolina Court of Appeals observed, the NCGA "acknowledged its statutory liability to North Carolina UNAC's (sic) policyholders with regard to the increase in guaranteed premiums and the default on the return of premium riders allowed by the Rehabilitation Order" (Pet. App. 15A). Any liquidation of the deposit will benefit solely the NCGA and is in fact contrary to the interests of the North Carolina policyholders to the extent they have any interest because it eliminates the deposit as protection against any future UNAC default.

Under these circumstances, even if the policyholders were not estopped from relitigating the effect of the Plan on the North Carolina deposit, the NCGA (to whom the policyholders have assigned their rights) is so estopped, and UNAC is entitled to summary judgment as a matter of full faith and credit.

CONCLUSION

For the above reasons, UNAC respectfully requests that the decision of the North Carolina Court of Appeals be reversed and that court be directed to enter summary

judgment for UNAC dismissing the NCGA's complaint and the cross-claim of the North Carolina Insurance Commissioner and Treasurer seeking the same relief the NCGA requested.

Respectfully submitted,

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No. 80-1496

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNDERWRITERS NATIONAL ASSURANCE COMPANY

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION; JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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COUNTER-QUESTION PRESENTED

The North Carolina courts declined to give full faith and credit to an Indiana rehabilitation court's abrogation of statutory rights of North Carolina policyholders in a deposit placed in trust in North Carolina by an insolvent insurer domiciled in Indiana. The deposit was made with the North Carolina Treasurer "for the sole benefit of North Carolina policyholders," and North Carolina law prescribes the rights of those policyholders in the deposit. The Indiana court gave no notice that it intended to adjudicate rights in the North Carolina deposit, and the deposit was never mentioned in either the rehabilitation proceeding or in the final Planof Rehabilitation.

The question presented is whether the Indiana court had the requisite jurisdiction to adjudicate rights in the North Carolina deposit and whether the North Carolina courts must give any such judicial determination full faith and credit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1496

UNDERWRITERS NATIONAL ASSURANCE COMPANY

Petitioner,

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION; JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE RESPONDENTS

The Respondents concur with the sections entitled "Parties Below" and the "Jurisdiction of the Supreme Court" in the Brief for the Petitioner filed by Underwriters National Assurance Company ("UNAC"). The section entitled "Questions Presented" in UNAC's brief differs substantially from that section in UNAC's Petition for Certiorari, but does not appear to raise issues not raised in the Petition for Certiorari. The Respondents also concur with the section entitled "Constitutional Provisions and Statutes Involved" in UNAC's brief save for the reference to Article I, Section 8, Clause 3 of the Constitution, which was not properly raised below.

The Respondents have included a brief Chronology of Events, beginning at page 1-A of the Appendix to this brief for the convenience of the Court.

STATEMENT OF THE CASE

The Deposit and the Parties. The Petitioner, UNAC, is an Indiana stock insurance company. Prior to its insolvency, it was licensed to do business in 45 states, including North Carolina, as well as in several foreign countries. After determining that UNAC's financial condition was questionable, the North Carolina Department of Insurance, by letter dated June 13, 1973, informed UNAC that a $100,000.00 deposit would be required as a condition to allowing UNAC to do business in North Carolina. (R. 23, Ex. Bd. 1)[1] By Letter dated June 18, 1973, UNAC stated that it was taking the necessary steps to place a $100,000.00 deposit with the North Carolina Department of Insurance to be held for the *"sole benefit of North Carolina policyholders."* (Emphasis added.) (R. 23, Ex. Bd. 2) By letter dated July 19, 1973, and attachments thereto, UNAC acknowledged that the securities were to be held in trust on behalf of North Carolina policyholders of UNAC. (R. 23, Ex. Bd. 4-7)[2]

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[1]References to the Record and to the separately paginated Exhibit Binder from the North Carolina Court of Appeals will be made by "R." and "Ex. Bd.," respectively, followed by the page number. The Exhibit Binder contains the numerous exhibits attached to the five affidavits filed in the North Carolina trial court. The text of the affidavits can be found in the Record itself. When referring to a particular exhibit, the Guaranty Association will cite the beginning page of the affidavit in the Record, followed by the appropriate page in the Exhibit Binder.

[2]UNAC's deposit was registered as follows: "Treasurer of the State of North Carolina *in trust* for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina Statutes." (Emphasis added.) (R. 23, Ex. Bd. 5)

Once made, the deposit became subject to North Carolina's comprehensive statutory regulation of the business of insurance. Among those statutes that are particularly relevant in demonstrating the legal nature of the UNAC deposit and its special status in protecting North Carolina policyholders are the following:

(1) N.C. Gen. Stat. § 58-188.5, which requires that the Treasurer of the State of North Carolina hold deposits made by insurance companies in trust; N.C. Gen. Stat. § 58-188.1(b), which allows the return of such deposits by the Trustee only after the insurance company has ceased to do business in North Carolina and has met all of its obligations; N.C. Gen. Stat. § 58-188.1(c), which states that actions to enforce the trust are to be brought in the Superior Court of Wake County, North Carolina; and N.C. Gen. Stat. § 58-185, which gives North Carolina policyholders a lien against the deposit made by an insolvent company to the extent of the insolvent company's defaulted obligations.

(2) N.C. Gen. Stat. §§ 58-155.10 to 58.155.17, which is North Carolina's enactment of the Uniform Insurers Liquidation Act ("Uniform Act"). The Uniform Act was promulgated and enacted in many states (but not in Indiana) because of the inapplicability of the Federal Bankruptcy Act. The Uniform Act deals both with the insolvency of a local insurance company and the insolvency of an insurer domiciled in another state but doing business locally. The purpose of the Uniform Act is to promote an orderly insolvency proceeding with regard to insurance companies doing business in a number of states. The Uniform Act is equally applicable to liquidation proceedings and rehabilitation proceedings. N.C. Gen. Stat. § 58-155.10(2). The Uniform Act recognizes the long-standing special status of deposits made by an insolvent insurer for the protection of policyholders in another state,

and requires that such deposits be used for the individuals for whose protection the deposit was made. N.C. Gen. Stat. §§ 58-155.10(10) and (11), 58-155.12(b), 58-155.15(c) and (d).

(3) N.C. Gen. Stat. §§ 58-155.65 to 155.84, which is North Carolina's enactment of the Life and Health Insurance Guaranty Association Model Act. The majority of states have now adopted the Model Act. (Indiana did so only subsequent to the insolvency of UNAC.) Under the North Carolina Life and Accident and Health Insurance Guaranty Association Act ("Guaranty Act"), all life, accident and health insurance companies doing business in North Carolina, whether domiciled in North Carolina or in another state, are required to become members of the North Carolina Life and Accident and Health Insurance Guaranty Association ("Guaranty Association"). N.C. Gen. Stat. § 58-155.70. When an insurance company domiciled in another state and doing business in North Carolina becomes insolvent, the Guaranty Association, through its members, must insure that the obligations owed by the insolvent insurer to North Carolina policyholders are met. N.C. Gen. Stat. § 58-155.72(4).

If the Indiana court were successful in denying use of the deposit for the sole benefit of North Carolina policyholders, the member insurers of the Guaranty Association would have to pay those obligations forgiven by the Indiana rehabilitation court. N.C. Gen. Stat. § 58-155.72(4). The solvent member companies of the Guaranty Association would be assessed an amount sufficient to pay those obligations. These assessments would result in an increased cost of doing business for the solvent companies and would be passed on to those companies' policyholders in the form of increased premiums, decreased dividends, and reduced benefits. UNAC, on the other

hand, would be allowed to retain the deposit that it placed in North Carolina for the protection of North Carolina policyholders.

To the extent that the Guaranty Association assumes the obligations owed by UNAC to North Carolina policyholders, those policyholders are deemed to have assigned their rights against the insolvent insurer to the Guaranty Association. N.C. Gen. Stat. § 58-155.72(9). Additionally, the Guaranty Act states that the Guaranty Association shall be subrogated to the rights assigned to it as against the assets of UNAC, and that the subrogation rights shall have the same priority against the assets of UNAC as those possessed by the policyholders. *Id.* Under the Guaranty Act, the obligation of the Guaranty Association to policyholders, and the Guaranty Association's assignment and subrogation rights, do not arise until after the *final order* of liquidation, rehabilitation or conservation. N.C. Gen. Stat. §§ 58-155.69(6), 58-155.72(4).

The Commissioner of Insurance and the Treasurer of the State of North Carolina, who are charged with the administration of the deposit and who held title to the deposit, join with the Guaranty Association as respondents in this matter in seeking to have the deposit used in accordance with the North Carolina statutes.[3]

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[3]UNAC states at page 4 of its brief that neither of these respondents have any interest in the dispute except as stakeholders. As stated by the Court below, under North Carolina law, ". . . the *title* and *rights* to securities . . . are vested in the Commissioner of Insurance, the Treasurer and the State." (Pet. App. 15A) The Commissioner of Insurance is charged with seeing that the laws of the State of North Carolina governing insurance companies are faifthfully executed. N.C. Gen. Stat. § 58-9(1). It is undisputed that the Treasurer has at all times since 1973 held the deposit made by UNAC in trust. "A trustee is not a mere stake holder. Upon him is imposed the duty of defending

The Indiana Insolvency Proceeding. On August 5, 1974, the Indiana Department of Insurance initiated an insolvency proceeding against UNAC. In response to the petition filed by the Indiana Department of Insurance, the Marion County Superior Court ordered the Commissioner of the Indiana Department of Insurance to take possession of the business and assets of UNAC and to conduct the business in such a way as to rehabilitate UNAC.

UNAC's financial problems were largely due to its improper underwriting of a large block of disability income insurance policies covering high income professional groups such as airline pilots, air traffic controllers and doctors. UNAC's disability income insurance policies were "noncancelable." (J.A. 59-66)[4] This noncancelable feature meant that the policies were renewable by the policyholder year after year at the same premium rate regardless of experience with that policyholder and regardless of the policyholder's increasing age. Thus, the policyholder was assured of having income protection at a fixed cost through most or all of the policyholder's income-producing years. Many of UNAC's disability insurance policies also contained a return of premium rider ("RPR"). The RPR, for which there was an additional premium charge, generally provided that, if no claim was made under the policyholder's basic disability insurance coverage for a period of 10 years, 80 percent of the premiums paid during that 10-year period would be returned to the policyholder. (R. 23, Ex. Bd. 9) The RPR

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the trust and preserving its assets . . . ." *In Re Trust Deeds of Smaltz,* 142 Pa. Super. 463, 466, 17 A.2d 455, 457 (1941) (citations omitted). *See State v. Dudley,* 127 N.J.L. 127, 129-30 21. A.2d 209, 210 (1941).

[4]References to the Joint Appendix will be made by "J.A." followed by the page number.

further provided that if claims were made during the 10-year period (less the claims paid by the company) would be returned to the policyholder. UNAC's liability to pay disability claims and RPR claims required substantial reserves that could not be raised by simply increasing the premiums on outstanding policies.

The Plan of Rehabilitation ("Plan") approved by the Indiana rehabilitation court on November 22, 1976, substantially reduced UNAC's need for reserves by cancelling obligations owed by UNAC to policyholders. The Plan converted noncancelable policies to "guaranteed renewable" policies. (J.A. 57) Under a guaranteed renewable policy, the policyholder has the option of renewing the policy, but the company has the option of increasing the premium. Thus, what were fixed premiums prior to UNAC's insolvency were subject to substantial increases after the rehabilitation. The Plan also eliminated UNAC's liability under the RPR. (J.A. 57) In return for his loss of rights under the RPR provisions, the policyholder received a nominal cash payment equal to 15.68 percent of the additional premium paid for the RPR. Thus, in return for a partial refund of the additional cost of the RPR, the policyholder lost the right to repayment of as much as 80 percent of his entire policy premium.

Absent use of the deposit made by UNAC in North Carolina for its intended purpose, the Guaranty Association would be obligated under the Guaranty Act to pay the amounts by which the premiums were increased pursuant to the Plan. The Guaranty Association would also be obligated to pay the policyholders in North Carolina the amounts to which they would have been entitled to under the RPR. N.C. Gen. Stat. § 58-155.72(4).

On June 8, 1976, the Guaranty Association, in conjuction with the guaranty associations of seven other states, intervened in the Indiana rehabilitation proceeding. (R. 30, Ex. Bd. 98) The concerted action on the part of the eight guaranty associations was precipitated by the fact that the proposed plan did not recognize the statutory assignment of policyholder rights to the guaranty associations under the various guaranty acts. (R. 30, Ex. Bd. 98) The Plan was ultimately altered to recognize those rights. (J.A. 57, 73) The guaranty associations also participated in the rehabilitation proceeding by negotiating a service contract between the guaranty associations and UNAC. (J.A. 27, 89)

As UNAC's brief carefully points out, both the North Carolina policyholders and the Guaranty Association were notified of the Indiana rehabilitation proceeding. However, at no point during the Indiana proceeding were North Carolina policyholders apprised by the rehabilitator or by the Indiana court of the existence of the deposit made in North Carolina for their protection or of their rights under North Carolina statutes in that deposit. The North Carolina policyholders were included in a single class along with all other policyholders. (J.A. 15, R. 30, Ex. Bd. 106) To the extent that the North Carolina deposit was considered a general asset, other policyholders in the single policyholder class would benefit and North Carolina policyholders would suffer. Thus, the North Carolina policyholders were included in a class in which there was a direct conflict of interest among class members without being apprised of that conflict or of facts sufficient to determine the conflict for themselves. Similarly, neither the rehabilitator nor the Indiana court ever informed the Guaranty Association of the existence of the deposit or that the deposit was purportedly part of the $31,171,998.00 shown in the Plan as general assets of UNAC. (J.A. 66)

UNAC's discussion of its convention blank is, at best, incomplete. The facts omitted in UNAC's discussion readily reveal that the rehabilitation court was probably misled by the convention blank as to the nature of the deposit held in North Carolina.

At page 10 of its brief, UNAC notes that insurance companies are required by the law of every state to file annual financial information with the Insurance Department of each state in which the company does business. UNAC correctly points out that the financial information is required to be presented in a uniform format called an "annual statement" or "convention blank," which is prescribed by the National Association of Insurance Commissioners. *E.g.*, Ind. Code § 27-1-3-13 and N.C. Gen. Stat. § 58-21. UNAC then correctly states that the convention blank requires a separate listing of the insurance deposits in each state and an itemized listing of all portfolio securities. Finally, UNAC notes that the total value of the portfolio securities is carried forward to the assets column of the insurer's balance sheet on the convention blank. UNAC then states at page 11 of its brief:

> The net of this is that UNAC's North Carolina deposit – together with all other deposits, was included in all calculations of the company's liquidation value, etc., in the formulation of the proposed plan, just as any other asset of UNAC, and any policyholder eventually electing to receive liquidation value received a check that included his proportionate share of the North Carolina bond along with everything else.

Prior to filing its Brief for the Petitioner in this Court, UNAC never before mentioned this convention blank in any of the proceedings involving the deposit made in North Carolina. The convention blank is clearly not part of the record below.

In discussing a document that is not part of the record, UNAC has apparently adopted the theory that the convention blank is a public document and, accordingly, is a matter of general knowledge to which this Court should give judicial cognizance. *Muller v. Oregon*, 208 U.S. 412, 421 (1908) This Court should have before it several other facts regarding UNAC's convention statement.[5]

The Convention statement filed by UNAC for the year ending December 31, 1974 – the year during which UNAC was determined to be insolvent – contained the following statement from the Commissioner of Insurance of Indiana:

> As previously advised, Underwriters National Assurance Company was placed in the hands of the Indiana Department of Insurance by order of Rehabilitation entered by Marion County Superior Court on August 5, 1974. For this reason there is no list of officers nor directors in the annual statement. This statement was compiled under the direct supervision of the Indiana Department of Insurance and reflects the financial condition of the company as of December 31, 1974.
>
> In October of 1974 we employed the actuarial firm of Milliman & Robertson to make a complete study of the company. We have also employed the certified public accountant firm of Coopers & Lybrand to do an audit of the com-

[5]A reproduction of the relevant portions of the covention statement for the year ending December 31, 1974, filed by UNAC appears in the Appendix to this brief at page 1-B. Additionally, certified copies of the relevant portions of UNAC's 1973, 1974, and 1975 convention blanks have been lodged with the Clerk for the convenience of this Court.

> pany. Based upon these reports and other information which we have generated, a decision about the future of the company will be made in the immediate future. When such determination has been made it will be communicated to the interested regulatory agencies.
>
> Lloyd M. Allen
> Commissioner

Based on the above statement it is apparent that the information set out in the convention blank is the same information presented to the rehabilitation court for use in restructuring UNAC.

In discussing the convention blank, UNAC states at page 10 of its brief that "Deposits are listed on page 18 of the convention blank under a schedule requiring listing of all deposits made with any Government, Province, State, District, County, Municipality, Corporation, firm or individual . . ." UNAC fails to quote to this Court the entire caption for the schedule to which it was referring. The entire caption is as follows: 'SCHEDULE OF ALL *OTHER* DEPOSITS Showing all deposits made with any Government, Province, State, District, County, Municipality, Corporation, firm or individual, *except* those shown in Schedule in Schedule E, and *those shown in 'Special Deposit Schedule' above."* (Emphasis added.) Thus, the schedule to which UNAC refers is the schedule showing *general* deposits made for the benefit of *all* policyholders. UNAC correctly states that the deposit made by UNAC in North Carolina is shown in that general deposit schedule, despite the fact that it was a special deposit for the benefit of North Carolina policyholders only.

UNAC has also omitted any reference to the other schedule shown on page 18 of the convention blank. That other schedule is captioned as follows: "SPECIAL

DEPOSIT SCHEDULE *Showing all deposits or investments NOT held for the protection of ALL the policyholders of the Company.*" (Emphasis added) Thus, the schedule on page 18 of the convention blank to which UNAC does not refer is the schedule requiring a listing of deposits, such as the one made in North Carolina, held for the benefit of a specific group of policyholders. Under that schedule in UNAC's convention blank the only entry is the single word "NONE."

The deposit made by UNAC in North Carolina was clearly for the protection of only North Carolina policyholders and should have been listed under the special deposit schedule rather than under the schedule showing deposits held for the benefit of all policyholders. Accordingly, the document filed with the North Carolina Department of Insurance and with the rehabilitation court in Indiana falsely characterized the North Carolina deposit as a deposit for the benefit of all policyholders.

The 1975 convention blank filed by UNAC with the North Carolina Department of Insurance also falsely states that there are no special deposits and that the deposit made in North Carolina was for the benefit of all policyholders of UNAC. The 1975 convention blank was filed in North Carolina on March 1, 1976, only a matter of months before the Plan was approved by the Rehabilitation Court. Thus, the rehabilitation court had apparently been led throughout the proceeding by the rehabilitator to believe that the North Carolina deposit was held for the benefit of all policyholders.

None of the convention blanks filed by UNAC in North Carolina reflect total assets equal to the $31,171,988 amount mentioned in the rehabilitation proceeding. Thus, even if the nature of the deposit had not been

misrepresented, the convention blanks could not be reasonably deemed to have put anyone on notice that the Indiana rehabilitation proceeding purportedly dealt with rights in the North Carolina deposit. The North Carolina policyholders and the Guaranty Association simply had no way of knowing their statutory rights were purportedly being abrogated.

At page 30 of its brief, UNAC again discusses the 1974 convention blank filed by the rehabilitator. UNAC states that the convention blank disclosed a deposit made in Virginia. UNAC's brief seems to imply that a special class of policyholders was created by the appearance of a single Virginia policyholder who supposedly could have represented the interests of both Virginia and North Carolina policyholders in their respective deposits. This is certainly not the case. The Virginia deposit, like the North Carolina deposit, was held for the benefit of local policyholders only. Va. Code § 381-110. However, like the North Carolina deposit, the Virginia deposit was shown on the convention blank as a deposit for the benefit of *all* policyholders of UNAC. Had the Virginia policyholders known of the convention blank, they would have been misled as to the nature of the deposit. Further, there is absolutely nothing in the record to indicate that the Virginia policyholders were apprised of the existence of the deposit made in Virginia or of their special rights therein. Thus, they could have represented neither their interests nor anyone else's with regard to a special deposit. Apparently, to this day, the Virginia policyholders are unaware of the existence of the deposit made for their protection or of their rights therein.

On November 22, 1976, the Indiana rehabilitation court issued its Final Judgment and the Plan. (J.A. 37) The Final Judgment recited that the rehabilitation court

had jurisdiction over all policyholders and over the eight guaranty associations involved (J.A. 38). The Final Judgment held: "To the extent that any claim, objection or proposal which was or *could have been presented* in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied." (Emphasis added.) (J.A. 40) The court does not explain how a claim "could have been presented" regarding the deposit when no policyholder knew of the existence of the deposit or could have reasonably anticipated that the court would attempt to abrogate statutory rights therein.

The Final Judgment also provided that the Indiana rehabilitation court would retain continuing jurisdiction over the parties and over the rehabilitation proceeding to resolve questions as to interpretation and implementation of the Plan and to modify the Plan as needed in light of future developments. (J.A. 42-43) At page 12 of its brief, UNAC quotes from the Plan as follows: "UNAC shall have no further obligation or liability to any guaranty association." UNAC's brief quotes only the first clause of that sentence. The first two clauses of the quoted sentence are: "UNAC shall have no further obligation or liability to any guaranty association, *other than* the obligation to recognize as valid the assignment of the policyowner's rights to the Guaranty Association and to treat the Guaranty Association as it would have treated the policyowner; . . . ." (emphasis added.) (J.A. 74) Copies of the Plan and the Final Judgment of the Indiana rehabilitation court were not mailed to policyholders, shareholders, insurance comissioners, agents and other interested parties until June of 1977. (R. 30, Ex. Bd. 292)

On June 8, 1977, a joint petition was filed with the Indiana rehabilitation court by UNAC and the eight

guaranty associations. (J.A. 89) The joint petition sought permission from the rehabilitation court to enter into a service contract. On June 14, 1977, the Indiana rehabilitation court issued an order stating ". . . that the Company and each of the Guaranty Associations are authorized and directed to execute a Service Contract in substantially the form attached to the Petition as Exhibit A and to do all acts reasonably necessary or appropriate to implement and carry out the Service Contract." (R. 30, Ex. Bd. 291) Under the Service Contract UNAC would continue to administer the insurance policies of policyholders residing in guaranty association states in accordance with the pre-rehabilitation terms of those policies. That is, UNAC would continue to honor the pre-rehabilitation RPR obligations owed to policyholders and would continue to charge the pre-rehabilitation guaranteed, fixed premium. The guaranty associations would pay to UNAC amounts equal to the RPR obligations paid and the increased premiums chargeable as a result of the rehabilitation proceeding. The Guaranty Association would also pay to UNAC a fee for administering the policies in accordance with the pre-rehabilitation terms of those policies.

On October 13, 1977, the Guaranty Association signed the Service Contract in substantially the same form as that approved by the Indiana rehabilitation court. The Service Contract signed by the Guaranty Association differed from the form approved by the Indiana rehabilitation court only to the extent that it contained the following language:

> It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters

> with the Commissioner of Insurance of North Carolina, including deposits understood to total One Hundred Thousand Dollars ($100,000.00), which rights and remedies are governed by North Carolina law.

(R.23, Ex. Bd. 34) By letter dated December 5, 1977, Underwriters forwarded to the Guaranty Association a fully executed copy of the Service Contract. In its December 5, 1977 letter UNAC stated:

> Enclosed is a signed copy of the Service Agreement between Underwriters National Assurance Company and North Carolina Life and [sic] Health Insurance Guaranty Association. As you know, this agreement is entered into pursuant to the Plan of Rehabilitation of UNAC that has been approved by the Indiana courts.
>
> The purpose of this letter is to set forth UNAC's understanding that the last paragraph in the form of agreement beginning "It is expressly agreed, however," is designed simply to recite that neither the Guaranty Association nor UNAC has waived any claims that it may have in connection with the North Carolina deposits. You should understand that UNAC takes the position that the Guaranty Association has no claims to the deposits. In particular, UNAC's Plan of Rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. That Plan has been approved by the Indiana courts and, as a matter of full faith and credit under the federal constitution, is now binding under North Carolina law as well. Please advise us if the Guaranty Association has any

> different view. As we understand it, the last paragraph was inserted by the Guaranty Association simply to preserve whatever rights it may have had after the implementation of the Plan, and we have executed the enclosed agreement and returned it to you with that understanding.

Thank you for your cooperation.

(R. 23, Ex. Bd. 35)

It was at this point that the Guaranty Association first learned that UNAC would take the position that the rehabilitation proceeding purported to affect the rights of North Carolina policyholders under North Carolina statutes in the deposit placed in North Carolina for the protection of local policyholders.

Post-Rehabilitation Proceedings In North Carolina And Indiana. On January 12, 1978, the Guaranty Association initiated a declaratory judgment action in the Wake County North Carolina, Superior Court. The defendants named were UNAC, the North Carolina Commissioner of Insurance, and the Treasurer of the State of North Carolina. (R. 3) The action filed by the Guaranty Association in North Carolina sought a judgment declaring the Guaranty Association's right to have the deposit made by UNAC in North Carolina used to pay the contractual obligations owed by UNAC to North Carolina policyholders. The North Carolina Commissioner of Insurance and Treasurer filed a cross-claim against UNAC requesting that the deposit made by UNAC be liquidated for the benefit of the Guaranty Association and North Carolina policyholders. (R. 8)[6] UNAC's answer and counterclaim

[6]UNAC's characterization at page 15 of its brief of the North Carolina Insurance Commissioner and the Treasurer as "nominal defendants," is incorrect. See footnote 3, *supra*.

filed in the North Carolina proceeding, while raising the constitutional issue of full faith and credit, made no claim that the relief sought in the North Carolina court would amount to an unconstitutional burden on interstate commerce.

In response to the suit filed in North Carolina, UNAC filed a Petition for Instructions on July 13, 1978, with the Indiana rehabilitation court. (J.A. 111) One of the matters with regard to which UNAC requested instructions was how to proceed under the Service Contract between UNAC and the Guaranty Association in light of the suit filed by the Guaranty Association in North Carolina. (J.A. 117-120) A hearing with regard to that question was held by the Indiana rehabilitation court on September 20, 1978. Both the Guaranty Association and UNAC appeared at that hearing and asserted their respective full faith and credit claims. (Pet. App. 31A-32A) The Indiana court ruled at the conclusion of the September 20, 1978 hearing that no rehabilitation rights in the deposit made by UNAC in North Carolina survived the rehabilitation proceeding. The court's ruling was embodied in a written order dated November 22, 1978 which stated, in part:

> 2. The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policyowner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

(Pet. App. 31A, 38A)

As indicated by the quoted portion of the Order above, the September 20, 1978 hearing was not a *de novo* hearing with regard to the issue of whether the rehabilitation court had jurisdiction to abrogate the statutory rights of North Carolina policyholders in the deposit located in North Carolina. The Indiana court, without ever mentioning jurisdiction, simply concluded that the earlier rehabilitation proceeding cut off policyholder rights North Carolina statutes in the deposit. The order of the Indiana court was issued more than ten months after the initiation of the North Carolina proceeding. The November 22, 1978 Order was appealed by the Guaranty Association to the Indiana Court of Appeals. The issues on appeal in Indiana are whether the Indiana court possessed the necessary jurisdiction to adjudicate rights in the deposit in North Carolina and whether, assuming jurisdiction, ". . . the Full Faith and Credit provision of the United States Constitution . . . would require the [Indiana] Court to honor the statutory rights of North Carolina policyholders." Brief of Appellant, *North Carolina Guaranty Association v. Department of Insurance, State of Indiana,* Indiana Court of Appeals, No. 2-1278A435. The case has been fully briefed and oral arguments have been heard. The Indiana Court of Appeals has stayed its consideration pending disposition by this Court of this certiorari proceeding.

On March 19, 1979, the North Carolina Superior Court held a hearing on motions for summary judgments filed by all parties in the North Carolina proceeding. (Pet. App. 19A) The parties agreed that no material facts were at issue. Affidavits and briefs were submitted by both UNAC and the Guaranty Association. The issues of whether the Indiana rehabilitation court had sufficient jurisdiction to deal with the deposit made in North Carolina, and

whether it did so, were fully argued before the North Carolina court. On April 11, 1979, the North Carolina trial court entered an order holding that the deposit made by UNAC in North Carolina should be applied for the benefit of North Carolina policyholders and the Guaranty Association. (Pet. App. 19A)

UNAC appealed the decision of the North Carolina Superior Court to the North Carolina Court of Appeals. While UNAC did raise the constitutional issue of full faith and credit, it did not assert that the holding of the North Carolina court below was an unconstitutional burden on interstate commerce. By opinion dated September 2, 1980, the North Carolina Court of Appeals unanimously affirmed the decision of the North Carolina Superior Court. (Pet. App. 5A) In affirming the decision of the North Carolina Superior Court, the North Carolina Court of Appeals held, in part:

> It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. *Continental Bank and Trust Co. v. Gold,* 140 F. Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the Court in Indiana. Because the

> Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata.*

(Pet. App. 15A) The North Carolina Supreme Court entered a judgment dismissing UNAC's appeal and denying UNAC's petition for discretionary review.

A chronology summarizing the events occurring in Indiana and North Carolina is set out beginning at page 1-A of the Appendix and is intended to assist this Court in sorting out the facts discussed in the Petitioner's and Respondents' brief.

SUMMARY OF ARGUMENT

The determination by the Indiana rehabilitation court that the North Carolina special deposit was a general asset of UNAC has no jurisdictional basis and, thus, is not entitled to full faith and credit in North Carolina. To require that full faith and credit be accorded to that determination would not further unify the states into a federal system, but divide them. Every state's efforts to regulate the conduct of foreign insurers and protect policyholders within its borders would be put at the mercy of the states where those insurers are domiciled.

The Indiana court clearly acted outside its jurisdiction, in abrogating statutory rights of North Carolina policyholder in the special deposit placed in trust in, North Carolina for their protection. First, it is undisputed that the Indiana court lacked jurisdiction over the North Carolina officials who

are trustees of the special deposit. The North Carolina trustees were necessary parties to any adjudication of rights in the deposit since their interest, and the interest of North Carolina, was in seeing that the State's statutory policy was followed in the distribution of the special deposit. The Indiana court thus lacked authority under both North Carolina law and Indiana law for its adjudication that the special deposit was a general asset of UNAC. Second, the jurisdictional claims of the Indiana court to adjudicate rights of the North Carolina policyholders cannot extend to this adjudication. In addition to being both unfair to the North Carolina policyholders and an affront to the sovereignty of North Carolina, the assertion of jurisdiction by the Indiana court to deal with the statutory rights of those policyholders proves defective, whether subjected to a minimum contacts analysis or a jurisdictional necessity analysis. It does not appear that the Indiana court even considered these objections to its assertion of jurisdiction to adjudicate rights in the North Carolina special deposit.

Further, the North Carolina policyholders were never apprised by the Indiana court of the existence of the North Carolina deposit, of their statutory rights in that deposit or of the Indiana court's intent to adjudicate rights in that deposit. While the North Carolina policyholders were notified that a rehabilitation proceeding was underway, they had no reasonable way of knowing that their rights in the special deposit would be adjudicated in that proceeding. Indeed, it is unlikely that the Indiana court would have even attempted to adjudicate rights in the North Carolina deposit had it not been misled by UNAC's convention blank as to the nature of that deposit.

Finally, North Carolina cannot be asked to accord full faith and credit to a judgment so inimical to the laws and

interests of North Carolina. The federal system would not be advanced but severely strained by such a requirement. This is not a case where the strong policies of two States collide headlong. Rather, this is a case where the strong policies of one State – policies that have been widely adopted in other states and consistently upheld by the courts – are undone by a haphazard and uncomprehending proceeding in another. North Carolina law should clearly prevail.

ARGUMENT

The North Carolina Court of Appeals has declared that UNAC's $100,000 deposit in North Carolina should be liquidated as intended for the sole benefit of North Carolina policyholders. That decision is consistent with universal principles of insurance law and trust law and North Carolina statutes governing deposits. That decision also reflects legitimate North Carolina concerns that policyholders residing in that State be fully protected when their insurance carriers become financially disabled from their obligations. To assure that its laws govern, North Carolina has retained for itself all significant jurisdictional contacts – including both legal title and actual possession of the deposit – to adjudicate any question concerning the special deposit. The Indiana court's inclusion of the special deposit in the plan of rehabilitation as a general asset of UNAC, in abrogation of North Carolina statutes, cannot command full faith and credit in North Carolina.

I. THE INDIANA REHABILITATION COURT LACKED JURISDICTION TO ADJUDICATE RIGHTS IN THE DEPOSIT HELD IN TRUST IN NORTH CAROLINA.

This Court has consistently held in a variety of contexts that the decision in one court is conclusive upon the merits under the Full Faith and Credit Clause in a court in another state "only if the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment." *Durfee v. Duke,* 375 U.S. 106, 110 (1963). As recently reiterated in *Nevada v. Hall,* 440 U.S. 410, 421 (1979), "[t]he Full Faith and Credit Clause does require each State to give effect to official acts of other States. A judgment entered in one State must be respected in another *provided that the first State had jurisdiction over the parties and the subject matter."* (Emphasis added.)

That critical proviso has not been satisfied in this case. The Indiana rehabilitation court did not have jurisdiction over the North Carolina parties possessing legal claims to the North Carolina trust deposit. Nor did the Indiana court have jurisdiction over the trust deposit itself. The Indiana court did not fully and fairly adjudicate issues of jurisdiction; therefore, the North Carolina courts correctly determined that the Indiana court lacked such jurisdiction that the Full Faith and Credit Clause would require the Indiana decision be given *res judicata* effect. Indeed, Indiana's attempt to decide questioned rights in the North Carolina deposit is so unfair to the North Carolina policyholders and such an affront to the legitimate North Carolina policies and interests embodied in the deposit that it implicates the Due Process Clause of the Fourteenth Amendment. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-294 (1980). Under these circumstances the Indiana judgment was not entitled to full faith and credit in North Carolina.

A. The Indiana Court Lacked Jurisdiction Over Either The Trust Corpus Or The Trustees.

UNAC does not question the holding of the North Carolina Court of Appeals that under North Carolina statutes the special deposit required of UNAC was held in trust in North Carolina with the North Carolina Treasurer and Commissioner of Insurance as trustees for the sole benefit of North Carolina policyholders. Nor does UNAC question the holding that the Indiana court lacked jurisdiction over these North Carolina officials. Rather, UNAC's position is that the lack of jurisprudiction over these North Carolina officials makes no difference since neither held any beneficial interest in the special deposit. UNAC argues that the Indiana court had jurisdiction over the beneficiaries of the trust, and could therefore adjudicate the claims of those beneficiaries. The legal title would be undisturbed, at least for the moment.

The North Carolina Court of Appeals correctly stated the rule that a court cannot consider an action concerning a trust without jurisdiction over either the trustee or the trust corpus. While this rule may not be one imposed by the Constitution, *Hanson v. Denckla,* 357 U.S. 235, 254 (1958), it is undoubtedly the general rule, *e.g.,* W. LAND, TRUSTS IN THE CONFLICT OF LAWS, 257 (1940) ("If . . . neither the trust property nor the trustee is subject to the judicial jurisdiction of the state, the court has no jurisdiction over the trust . . . ."); 76 Am.Jur.2d, *Trusts* § 572, at 783-84 (1975); Annot., *Jurisdiction of Suit Involving Trust as Affected by Location of Res, Residence of Parties to Trust, Service, and Appearance,* 15 A.L.R.2d 610 (1951), and the rule followed in Indiana. Under Indiana common law, a judgment against a trust was void if the court had no jurisdiction over the corpus of the trust. *See*

Premier Steel Co. v. Yandes, 139 Ind. 307, 315-16, 38 N.E. 849 852 (1894). Other cases have allowed Indiana courts of equity to adjudicate questions concerning a trust where the corpus was located in another state by exercising jurisdiction the trustee. *See Sturdevant v. Pike,* 1 Ind. 277, 279 (1848). It is clear, however, that Indiana law contemplates that a court exercising jurisdiction to determine rights in a trust must have before it either the trustee or the corpus. *See* Ind. Code § 30-4-6-3 (venue). *See also Newlin v. Newlin,* 114 Ind. App. 574, 581, 52 N.E.2d 503, 505 (1944).

The analysis of jurisdiction in a matter involving a trust must begin with this Court's decision in *Hanson v. Denckla,* 357 U.S. 235. In *Hanson,* a Florida probate court had declared a Delaware trust to be illusory. Florida law, however, made the trustee an indispensable party to an action questioning the validity of a trust. Because the Florida court did not have jurisdiction over the Delaware trustee, this Court held, the Delaware court was not bound by the Florida judgment. "Since Delaware was entitled to conclude that Florida law made the trust company an indispensible party," the Court said, "it was under no obligation to give the Florida judgment any faith and credit – even against parties over whom Florida's jurisdiction was unquestioned." *Id.* at 256. North Carolina was similarly entitled to conclude, therefore, that the Indiana rehabilitation court did not have authority under Indiana law for its adjudication that the North Carolina special deposit was a general asset of UNAC.

It was not just Indiana law, however, that made the North Carolina trustees indispensable: it was also North Carolina law. It is not the case here that the North Carolina officials are nominal parties with no interest in the deposit.[7] Their interest is the interest of North

[7]See footnote 3, *supra.*

Carolina. North Carolina required that the special deposit be placed in trust as a part of its comprehensive statutory scheme for the regulation of insurance. North Carolina officials serve in their official capacities as trustees of the special deposit. UNAC is undoubtedly correct that the effect of the decision below is to make these North Carolina officials "indispensable but unreachable parties." (UNAC Brief at 33). That is exactly what North Carolina law intends. If North Carolina is to give effect to its laws governing the distribution of the special deposit, it must give to its courts the exclusive jurisdiction to adjudicate questions concerning the deposit. Requiring UNAC to sue in North Carolina to have rights in the deposit adjudicated places no unreasonable burden on UNAC.

This Court has recognized just such exclusive jurisdiction in each State to control the administration of real estate located within its borders. In *Clarke v. Clarke*, 178 U.S. 189 (1900), and again in *Fall v. Eastin*, 215 U.S. 1 (1909), the Court held that a state court decree purporting to convey land located in another state was without extraterritorial effect, even though in both cases all claimants to the land had been before the Court granting the decree. It was the interest of the State itself in the land located within its borders that required that the decrees not be recognized:

> Of what efficacy . . . would be the power of one State to control the administration, through its own courts, of real estate within the State . . . if all such real estate could be disposed of and controlled by the decree of the court of another State. Here, again, the argument relied on must rest upon the false assumption that an exclusive power which confessedly exists in the courts of one jurisdiction may be rendered nugatory by the action of the courts of another jurisdiction in

> whom is vested no authority whatever on the subject.

Clarke v. Clarke, 178 U.S. at 194.

North Carolina has similar interests in exercising exclusive jurisdiction to determine rights in the North Carolina special deposit. The legitimacy of such special deposits for the protection of local policyholders is well established. The North Carolina Supreme Court has very recently addressed the nature and purpose of these deposits:

> Deposits pursuant to Article 20 [of the North Carolina Statutes] constitute a *trust* for the benefit of North Carolina policyholders and are not *assets* of the insolvent insurance company. *Continental Bank & Trust Co. v. Gold*, 140 F. Supp. 252 (E.D.N.C. 1956); 2 Couch on Insurance §§ 22:94, 22:96, 22:111 (2d Ed. 1959); 19 Appleman, Insurance Law and Practice § 11094 (1979 Supp.); *see also Guaranty Association v. Assurance Co.*, 48 N.C. App. 508, 269 S.E.2d 688, *cert. den.*, 301 N.C. 527, 273 S.E.2d 453 (1980), *cert. granted*, ____ U.S. ____, 68 L.Ed.2d 838, ____ S.Ct. ____ (1981). Such deposits supplement the general corporate law which does little to protect claimants and policyholders of insolvent insurers.

North Carolina v. Reserve Insurance Co., No. 113, slip op. at 8 (N.C. Supreme Court, decision filed August 17, 1981) (emphasis in original). The opinion in *Reserve* is included in the Appendix to this brief beginning at page 1-C.

UNAC's entire argument is based upon the proposition that the North Carolina deposit is a general asset of

UNAC. That is clearly not the law in North Carolina. As the North Carolina Supreme Court said in *North Carolina v. Reserve Insurance Co.*: "Special deposits are not general assets." *Id.* at 14.

This Court has also recognized that a special deposit of this type is legally "segregated from the mass of property owned by the [foreign insurance] company:"

> It may be appropriate to observe that the objections to the statute in Tennessee do not necessarily embrace enactments that are found in some of the States requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policyholders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. *Insurance funds set apart in advance for the benefit of home policyholders of a foreign insurance company doing business in the State are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policyholders in other States know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited.*

Blake v. McClung, 172 U.S. 239, 257 (1898) (emphasis added) (*dictum*).[8]

[8]North Carolina first passed statutes governing such deposits made by foreign insurers one year after this Court's decision in *Blake v. McClung* approved of them. *See*, 1899 N.C. Sess. Laws, Ch. 54, s. 17.

The commentators on insurance law have also consistently recognized that such deposits enjoy a special status. UNAC quotes *Couch on Insurance* for the proposition that an insurance company insolvency is a matter of general public concern. (Brief at 21) UNAC does not quote other passages from that treatise specifically approving the role of special deposits in meeting that concern:

> A deposit of securities made by a foreign insurance company with the state superintendent of insurance constitutes a trust fund for the benefit of local policyholders and bond obligees and under the statutory provisions relative to such deposit the superintendent owes no duty to the state superintendent of insurance of the domicile of the company acting as liquidator of the same until he is satisfied upon examination of the books of the company and affidavits of its principal officers and other evidence that all the obligations and liabilities which the deposit was made to secure have first been paid or extinguished.

2 *Couch on Insurance,* § 22:96 (2d ed. 1959); *see also,* §§ 22:94, 22:111, *Accord,* Joyce, *Law of Insurance* § 3595 (2d ed. 1918) ("A deposit with a state treasurer of securities as a guaranty for the payment of policies of an insurance company, whether made as a statutory requirement or voluntarily, . . . creates a trust for the benefit of such policyholders in case of the insolvency of the company."); 19 Appleman, *Insurance Law and Practice* § 11094 (2d ed. 1946); 43 Am.Jur. 2d, *Insurance* §§ 139, 140 (1969); and 44 C.J.S., *Insurance* § 134 (1945).

The decisions of state courts uniformly uphold the priority of local policyholders in deposits made by foreign

insurers for their benefit.[9] *See Vandiver v. Poe,* 119 Md. 348, 87 A. 410 (1913), where the court, in upholding the rights of local policyholders in a special deposit, said "there is hardly a break in the line of decisions to the effect that receivers and assignees are not entitled to demand the possession of such securities . . . ." *Id.* 87 A. at 413.[10]

North Carolina requires these special deposits as a condition to a foreign insurer conducting business in North Carolina. The legitimacy of a local policy that limits the conduct of business in this matter is well recognized. In *Clark v. Willard,* 292 U.S. 112 (1934), this Court considered the insolvency of an insurance company domiciled in Iowa and doing business in Montana. A domiciliary receiver was appointed in Iowa. In a suit against the company in Montana filed after the appointment of the receiver in Iowa, the Montana court concluded that creditors in Montana were at liberty to levy attachments and executions against the property of the insolvent insurance company in Montana. In reversing the decision of the Montana court, this Court said: "In thus holding, we do not say there is an invariable rule by which the title of the statutory liquidator must prevail over executions and attachments outside the state of his appointment." *Id.* at 122. This Court went on to hold that if there is a local

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[9]*Preferred Insurance Co. v. Bentley,* 223 Ga. 735, 157 S.E.2d 737 (1967); *Van Schaick v. Bowen,* 131 Ohio St. 310, 2 N.E.2d 824 (1936); *State v. American Bonding & Casualty Co.,* 206 Io. 988, 221 N.W. 585 (1928); *Maurer v. International Re-Insurance Corp.,* 20 Del. Ch. 173, 174 A. 360 (1934); *Boston & Alb. Railroad v. Mercantile Trust & Deposit Co.,* 82 Md. 535, 34 A. 778 (1896).

[10]*Accord, McMurray v. Commonwealth,* 249 Mass. 574, 144 N.E. 718 (1924); *Crowell v. Terrell,* 250 S.W. 252 (Tex. Civ. App. 1923); *Cooke v. Warner,* 56 Conn. 234, 14 A. 798 (1888); *In re Guardian Mutual Life Insurance Co.,* 13 Hun. 115 (N.Y.S. Ct. 1878); *Ruggles v. Chapman,* 59 N.Y. 163 (1874).

policy expressed in statute or by a decision allowing an unequal distribution of assets of a foreign insolvent corporation in favor of local creditors, that policy would prevail. North Carolina's enactment of deposit statutes and the Uniform Insurers Liquidation Act and the North Carolina case law, all of which give priority in special deposits to local policyholders, clearly express such a local policy. *E.g.*, N.C. Gen. Stat. §§ 58-155.10 to 58-155.17, 58-185; *Continental Bank & Trust Co. v. Gold,* 140 F. Supp. 252 (E.D.N.C. 1956).

State policies favoring local policyholders, as approved in *Clark v. Willard,* can be applied to an insurance company as a limitation on the company's right to transact insurance business in the State. In *Relfe v. Rundle,* 103 U.S. 222, 225-26 (1880), this Court said:

> No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, *without limitation, express or implied,* the corporation comes in as it has been created. Every corporation necessarily carries it charter wherever it goes, for that is the law of its existence. (Emphasis added.)

In recognizing that a state can apply limitations in allowing a foreign corporation to do business. *Relfe,* like *Clark v. Willard,* clearly indicated that a local policy allowing an unequal distribution of the assets of a foreign insolvent corporation in favor of local creditors would prevail.

Despite the overwhelming weight of authority recognizing the legitimacy of such deposits and embracing their unique legal status, the North Carolina law here would be rendered nugatory by the action of the Indiana rehabilitation court. North Carolina has retained all significant

jurisdictional contacts to assure that it would be solely responsible for the distribution of the special deposit. Its exclusive jurisdiction should be recognized.

UNAC deposited securities in trust in North Carolina to protect North Carolina policyholders in contemplation of the exact event that subsequently occurred. UNAC now takes the inequitable position that the deposit should not be used for its stated purpose of fulfilling the contractual obligations owed to North Carolina policyholders by the insolvent company. Rather, UNAC would have the solvent insurance companies doing business in North Carolina, through the assesments made on them by the Guaranty Association, pay the contractual obligations owed by UNAC to North Carolina policyholders. The assessed companies would be forced to recoup their losses by increasing premiums or decreasing benefits to other policyholders. Thus, other North Carolina policyholders, most of whom have probably never heard of UNAC, would ultimately pay for UNAC's defaults, and UNAC, the party at fault, would be allowed to keep the deposit that it made for the protection of its policyholders in North Carolina. This would not be equitable, and such a result certainly would not violate the Full Faith and Credit Clause.

B. The Indiana Court Lacked The Requisite Jurisdictional Contacts To Adjudicate Rights In The North Carolina Trust.

The Indiana rehabilitation court's claim to jurisdiction to adjudicate rights in the deposit by virtue of jurisdiction over the beneficiaries of the trust, the North Carolina policyholders, is flawed by the limited nature of that jurisdiction. The standard by which all assertions of state court jurisdiction are to be evaluated by the "minimum con-

tacts" standard first announced by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Shaffer v. Heitner*, 433 U.S. 186 (1977). The focus of inquiry under the *International Shoe* standard is whether the person over whom jurisdiction is asserted has such contacts "with the state of the forum as make it reasonable, in the context of our federal system of government, to require [the person] to defend the particular suit which is brought there." *International Shoe Co. v. Washington*, 326 U.S. at 317. The concept of minimum contacts, therefore, is intended to address two concerns that are present when a state court attempts to adjudicate the rights of nonresidents: "It protects the defendant against the burdens of litigating in a distant or incovenient forum. And it acts to ensure that the states through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

What is "reasonable," of course, largely depends on what is being adjudicated. A nonresident's activities within a forum state may make it reasonable for that state to adjudicate matters arising out of, or closely associated with, those activities, but not to consider any and all claims against that nonresident. *E.g., McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957) ("It is sufficient for purposes of due process that the suit was based on a contract which has a substantial connection with [the forum] State"); *see generally*, von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1121 (1966). Thus contacts are not to be considered in the abstract, but to establish "the relationship among the defendant, the forum, *and the litigation.*" *Shaffer v. Heitner*, 433 U.S. at 204 (emphasis added).

UNAC dwells in its brief on the jurisdiction of a rehabilitation court to modify in a uniform fashion the

contractual policy rights of all policyholders as part of an effort to save an insolvent insurer. That is not, however, the litigation here in question. The question before this Court is the jurisdiction of the Indiana court to determine, in abrogation of North Carolina statutes, that the special deposit held in trust in North Carolina was a general asset of UNAC.

Whatever jurisdiction the Indiana court had to modify policy rights in the context of a rehabilitation proceeding does not extend to include the determination of rights in the special deposit. UNAC relies heavily in its brief on this Court's decision in two cases – *Neblett v. Carpenter,* 305 U.S. 297 (1938), and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) – allowing jurisdiction in similar rehabilitation proceedings. Although *Carpenter* does not really discuss the jurisdictional issue, the opinion in *Mullane* announced what has come to be called the doctrine of "jurisdiction by necessity." *See* Fraser, *Jurisdiction By Necessity – An Analysis of the Mullane Case,* 100 U. Pa. L. Rev. 305 (1951). The doctrine of "jurisdiction by necessity" allows a court to adjudicate conclusively rights of persons over whom it would not otherwise have jurisdiction where the question presented is one that must be decided and it is not possible for that court or any court to obtain jurisdiction over all those whose rights will be affected. It is doubtful whether *Mullane* survives this Court's holding in *Shaffer v. Heitner* that all assertions of state-court jurisdiction be evaluated according to a "minimum contacts" analysis. *See Shaffer v. Heitner,* 433 U.S. at 211 n.37; Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 Sup. Ct. Rev. 77, 105-10.

In applying a minimum contacts analysis, it would seem that all of the North Carolina policyholders' affiliating circumstances are with North Carolina, not Indiana. The

only discernible contact between the North Carolina policyholders and Indiana is that UNAC is a corporation domiciled in Indiana. The North Carolina policyholders, however, negotiated and purchased their insurance in North Carolina. As a result of its conduct of business in North Carolina, UNAC was subject to North Carolina's comprehensive insurance regulation, requiring it to place a special deposit in trust in North Carolina. The North Carolina policyholders had every reason to believe that any dispute that should arise regarding their relationship with UNAC would be resolved in a North Carolina forum, not that they would be "haled into court" in Indiana. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 297.

Many of the same considerations that would lead a court to exercise "jurisdiction by necessity" are also applicable in a "minimum contacts" analysis. If an insolvent insurer is to be rehabilitated, there must be one court empowered to compromise and adjust the contractual rights of all policyholders. The exercise of jurisdiction by the Indiana court would, therefore, advance both the interest of Indiana in providing a forum for the rehabilitation of its domiciliary insurance company and the interests of the interstate judicial system in the efficient resolution of disputes. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 292. More important, the exercise of jurisdiction by the Indiana court for the limited purpose of modifying policy rights is neither unfair to the North Carolina policyholders nor an encroachment on the sovereignty of North Carolina. *See* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification,* 92 Harv. L. Rev. 718, 732 (1979). There is no readily apparent policy of North Carolina upon which such a limited exercise of jurisdiction would intrude. In fact, the North Carolina Supreme Court has recognized the ability of a domiciliary rehabilitation proceeding in another state to

modify contractual rights of policyholders residing in North Carolina. *Taylor v. Pacific Mutual Life Insurance Co.*, 214 N.C. 770, 200 S.E. 882 (1939).

For the narrow issue of modifying policy rights, therefore, it may be enough that UNAC is a corporation domiciled in Indiana. That is, to be sure, a modest claim to jurisdiction, but such an adjudication is itself modest.

None of these considerations apply, however, to the adjudication by the Indiana court that the North Carolina special deposit was a general asset of UNAC. For that determination the Indiana court was not exercising jurisdiction to decide a question for which there was no alternative forum. North Carolina is clearly an alternative forum and the only proper forum. North Carolina law requires that the special deposit be placed in trust, and the trust corpus, trustees and beneficiaries all are to be found in North Carolina. Since rights in the deposit could be readily adjudicated in North Carolina any action by the Indiana court regarding the deposit cannot, therefore, be characterized as an exercise of "jurisdiction by necessity."

Unlike the rights involved in the modification of policies, the rights claimed by the North Carolina policyholders in the North Carolina special deposit are statutory rights that are distinct from the rights asserted by other UNAC policyholders. The North Carolina policyholders cannot, therefore, assume that their interests will be fairly represented by other class members who would benefit if the North Carolina deposit were to be determined a general asset of UNAC. This limitation on the doctrine of virtual or class representation is not merely one imposed by local rule or procedure, but by the Constitution. *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also* Note, *supra*, 92 Harv. L. Rev. at 732 & n.117.

Perhaps even more important is the violence that the Indiana adjudication does to the interests of North Carolina.

The special deposit here in question is required as a condition precedent to a foreign insurance company doing business in North Carolina. Distribution of the deposit is governed by North Carolina statutes. Its obvious purpose is to protect North Carolina policyholders in the event of the insolvency of a foreign insurer. The interest North Carolina has in making these statutory provisions to protect local policyholders cannot seriously be questioned. *See State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U.S. 154 (1945); *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313 (1943). In light of these interests of North Carolina in adjudicating claims on the deposit under its statutes, the assertion of jurisdiction by the Indiana court, based on such tenuous ties with those whose rights are affected, can only be seen as well outside the bounds of authority imposed by the federal system.

The apparent view of UNAC is that jurisdiction for adjudication of rights in the deposit by the Indiana court may be justified in light of the entire rehabilitation proceeding. Jurisdiction for this adjudication must stand on its own, however, and cannot be justified as a necessary adjunct to the rehabilitation proceeding. This Court in *Hanson v. Denckla,* 357 U.S. 235, rejected similar jurisdictional claims of a probate court. There the settlor of a Delaware trust died domiciled in Florida. The Florida probate court, applying Florida law, held that the trust was invalid because the settlor had reserved too much power over the trustee and the trust corpus, and that the corpus therefore passed under the residuary clause of the settlor's will. This Court held that the Florida probate court could not create for itself jurisdiction to determine the validity of the trust by declaring it to be a part of the estate over which it did have jurisdiction. "[J]urisdiction cannot be predicated upon the contingent role of this Florida will," the Court said. "Whatever the efficacy of a so-called *'in rem'* jurisdiction over assets admittedly pass-

ing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated in its courts." *Id.* at 248. Thus, the decree of the Florida court could not be conclusive of the interests of nonresidents over whom it had no jurisdiction. Similarly, in this case, the Indiana court could not create jurisdiction in itself to adjudicate rights in the deposit simply to augment the assets available to the Indiana rehabilitation court.

It is clear in this case that the Indiana court's adjudication respecting the North Carolina deposit is far more ambitious than its basis for rehabilitation jurisdiction can support. The considerations that favor its jurisdiction to modify uniformly the contractual rights of all UNAC's policyholders do not apply to its assertion of jurisdiction over the North Carolina special deposit. It is an attempt to extend a kind of "jurisdiction by necessity" far beyond the necessity. All the significant contacts were with North Carolina. That is where the distribution of the special deposit should be decided.

C. The North Carolina Court of Appeals Was Not Foreclosed From Addressing The Sufficiency Of The Indiana Court's Jurisdiction.

At page 34 of its brief UNAC argues that, under *Durfee v. Duke,* 375 U.S. 106, the North Carolina court was prohibited from adjudicating rights in the deposit held in trust in North Carolina. In so arguing, UNAC reasons that the issue of jurisdiction was fully and fairly litigated by the Indiana court and, therefore, the North Carolina court is prohibited from determining that the Indiana court lacked jurisdiction and then proceeding itself to adjudicate rights in the deposit. The November 22, 1976 order issued by the Indiana court contained a conclusory recitation that the

Indiana court had jurisdiction "over the subject matter and over the parties." (J.A. 38) However, the mere recitation of jurisdiction does not prevent a court in another state from inquiring into the foreign court's jurisdiction to render a judgment. *Durfee v. Duke,* 375 U.S. at 110; *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457, 469 (1873).

Because the North Carolina courts held that the Guaranty Association sustained its burden of proof in showing that the Indiana court did not have jurisdiction, the burden of proof now rests on UNAC to disprove the North Carolina court's determination of its own jurisdiction, to disprove that that determination was reached by an appropriate procedure, and to disprove that the North Carolina courts' judgment was amply supported in evidence. *Williams v. North Carolina,* 325 U.S. 226, 234 (1945).

As required by *Durfee v. Duke,* the North Carolina Superior Court carefully considered whether the Indiana rehabilitation court had fully and fairly considered jurisdiction in the deposit and determined that "neither the deposit made by UNAC in North Carolina, nor the special legal rights of North Carolina policyholders in that deposit were specifically considered by the Indiana court in the rehabilitation order dated November 22, 1976." (Pet. App. 23A) Having thus determined that the Indiana court did not fully and fairly consider jurisdiction as to the deposit located in North Carolina, the North Carolina Superior Court determined that jurisdiction over the deposit rests with the North Carolina court and proceeded to determine rights in the deposit. The North Carolina Court of Appeals, in determining that the Indiana judgment was not entitled to full faith and credit, considered and affirmed the findings by the Superior Court as to the proceedings in Indiana. (Pet. App. 6A-13A. 15A.)

UNAC does not even attempt to argue that jurisdiction was fully and fairly considered by the Indiana rehabilitation court during the proceeding terminating in 1976. This is understandable, since neither the existence of the deposit, the rights under North Carolina statutes, nor the fact that title was held by North Carolina officials was mentioned by the Indiana court in its 1976 order. (J.A. 37-81) Rather, UNAC argues that the 1978 hearing held by the Indiana court on UNAC's petition for instructions regarding the service contract was a full and fair determination that the Indiana court had jurisdiction to deal with the deposit held in trust in North Carolina. (Brief p. 34) While it is apparent that the North Carolina court also considered the Indiana court's November 22, 1978 order (Pet. App. 24A), such consideration was not necessary. An examination of the November 22, 1978 order issued by the Indiana court clearly indicates that the 1978 hearing was not a *de novo* hearing as to jurisdiction and that the Indiana court made no specific finding as to jurisdiction. (Pet. App. 31A-41A) The 1978 order merely stated that the 1976 final Order and Plan cut off the statutory rights of North Carolina policyholders in the deposit held in trust in North Carolina. There is no basis for the argument that the 1978 hearing was a full and fair determination of jurisdiction, and there is certainly no basis for the bootstrap argument that any such determination should relate back to the 1976 final Order and Plan. It is clear that neither the North Carolina policyholders nor the Guaranty Association ever had "their day in court" on the issue of the Indiana court's treatment of the special deposit left in trust in North Carolina by UNAC, and the policyholders' statutory rights in that deposit. *See Lewis v. Hanson,* 36 Del. Ch. 235, 259, 128 A.2d 819, 834 (1957), *aff'd., Hanson v. Denckla,* 357 U.S. 235.

II. THE INDIANA JUDGMENT WAS RENDERED WITHOUT ANY NOTICE THAT THE DEPOSIT EXISTED OR THAT RIGHTS IN THE DEPOSIT WERE BEING ADJUDICATED.

UNAC repeatedly proclaims that the North Carolina policyholders and the Guaranty Association were notified of the rehabilitation proceeding. While sufficient notice that a rehabilitation proceeding was pending may have been given, neither the North Carolina policyholders nor the Guaranty Association was ever apprised of the existence of the deposit in North Carolina or of any anticipated abrogation of statutory rights in that deposit. The deposit was not mentioned in any of the notices to policyholders or the Plan of Rehabilitation. Further, it would not have been reasonably possible for anyone to determine that the deposit was included as an asset of UNAC for purposes of the rehabilitation. The only mention of assets subject to the rehabilitation proceeding was the single reference to the $31,171,988 amount in the Plan. (J.A. 66) Further, even in the unlikely event that a North Carolina policyholder would examine the convention blank filed by UNAC with the North Carolina Department of Insurance, the policyholders, like the Indiana court, would have been misled. Since UNAC's convention statement falsely listed the North Carolina deposit as being held for the benefit at all UNAC policyholders, the North Carolina policyholders would have been unaware of any special interest that should have been asserted before the Indiana court.

As this Court recently held in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 291:

> A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff,* 95 U.S. 714, 732-733 (1878). Due process

> requires that the Defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 at 313-14 (1950), and be subject to the personal jurisdiction of the court.

In *Mullane*, this Court said "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 315. Because the decision in Indiana denied due process of law to the policyholder and the Guaranty Association, the North Carolina Court of Appeals properly refused to accord that decision full faith and credit.

III. THE INDIANA COURT IGNORED NORTH CAROLINA LAW IN DETERMINING RIGHTS IN THE NORTH CAROLINA DEPOSIT.

Even if the Indiana rehabilitation court had jurisdiction to determine rights in the North Carolina special deposit, it made no effort to apply North Carolina law to that determination. UNAC does not contend otherwise:

> UNAC argues, in effect, that judicial economy should override all other concerns to give the Indiana rehabilitation court jurisdiction to decide any question tending to affect the rehabilitation, regardless of how attenuated the contacts of the Indiana forum to that question. (Brief p. 25) Judicial economy cannot, however, excuse the Indiana court's disregard of North Carolina law governing distribution of the special deposit.

The concerns present here are much the same as in a minimum contacts analysis:

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or

> the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contracts, creating state interests, with the parties and the occurrence or transaction.

Allstate Insurance Co. v. Hague, ____U.S. ____, 101 S.Ct. 633, 637-38 (1981) (footnotes and citations omitted). *See* Kirgis, *The Role of Due Process and Full Faith and Credit in Choice of Law*, 62 Corn. L. Rev. 94 (1976).

The North Carolina policyholders had every reason to believe, upon purchasing insurance from UNAC, that they would be protected by North Carolina law should UNAC become insolvent. Instead they find themselves deprived of that protection by a forum without significant contacts with them. *See Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

Perhaps more important, as a result of that disregard of North Carolina law, North Carolina is now being asked to accord full faith and credit to a judgment that it antithetical to North Carolina law and interests. This Court has recognized that the judgment of one State can so interfere with important interests of another that the national policy of full faith and credit will not require that it be enforced there. *See, e.g., Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943); *Williams v. North Carolina*, 317 U.S. 287, 294-95 (1942); *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 103. This is just such a case. The intrusion on North Carolina's

important interests in regulating foreign insurers is unmistakeable. North Carolina cannot be forced to accede to the nullification of its laws.

IV. THE GUARANTY ASSOCIATION IS NOT ESTOPPED FROM ASSERTING ITS RIGHTS IN THE NORTH CAROLINA DEPOSIT.

UNAC also argues that the Guaranty Association is estopped from challenging the Plan of Operation and is bound by its terms. (Brief pp. 33-35) This theory of collateral estoppel without jurisdiction over the subject matter or the necessary parties was implicitly rejected by this Court in *Hanson v. Denckla,* 357 U.S. 235. *See, Lewis v. Hanson,* 36 Del. Ch. at 834, 128 A.2d at 819. In any event, because of the lack of notice of the nature and effect of the Indiana proceedings, it would be fundamentally unfair and a violation of the Due Process Clause to hold that the Indiana judgment rendered without sufficient jurisdiction or notice could bind the Guaranty Association.

CONCLUSION

For the reasons discussed above, the Respondents respectfully request that the decision of the North Carolina Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

CHRONOLOGY OF EVENTS

Indiana	North Carolina
	1. 7-19-73 Deposit placed in N.C. in trust for sole protection of N.C. policyholders
	2. 2-26-74 UNAC filed convention blank in N.C. showing deposit as general asset rather than special deposit
1. 8-5-74 UNAC placed in rehabilitation proceeding pursuant to petition of Indiana Department of Insurance (J.A. 13)	
	3. 3-11-75 Rehabilitator filed convention blank on behalf of UNAC in N.C. showing deposit as general asset rather than special deposit
2. 10-30-75 Court certified class consisting of "all policyholders who now hold or have held contracts of insurance with UNAC" (J.A. 15; 48)	
	4. 3-1-76 Rehabilitator filed convention blank on behalf of UNAC in N.C. showing deposit as general asset rather than special deposit

3. 6-8-76 Eight guaranty associations, including the North Carolina Guaranty Association intervened (Ex. Bd. 98, J.A. 49)

4. 6-9-76 Hearing held on proposed plan of rehabilitation (Ex. Bd. 114)

5. 6-19- or 7-19-76 Court tentatively approved proposed plan of rehabilitation (J.A. 37; 50)

6. 10-12-76 Eight Guaranty Associations petition court regarding form letter to policyholders covered by guaranty associations and the concept of a service contract (J.A. 27)

7. 10-14-76 Final hearing on Plan of Rehabilitation held (J.A. 50)

8. 11-22-76 Plan of Rehabilitation approved and all inconsistent claims that were, or could have been, presented were dismissed (J.A. 37)

9. 2-4-77 UNAC's court-appointed trustees elect Board of Directors and UNAC released from rehabilitation (J.A. 120)

10. 6-8-77 Joint Petition for Instructions filed by UNAC and eight guaranty associations regarding approval of proposed Service Agreement (J.A. 89)

11. 6-14-77 Court approved Service Contract (J.A. 118)

12. 12-5-77 UNAC first informed N.C. Guaranty Association of its contention that the rehabilitation proceeding affected statutory rights of N.C. policyholders in deposit placed in trust in N.C. (R. 23; Ex. Bd. 35)

5. 1-12-78 N.C. Guaranty Association filed complaint in Wake County, N.C. Superior Court seeking a declaratory judgment regarding rights in deposit held in trust in N.C. (J.A. 99)

13. 7-13-78 UNAC filed petition for instructions asking how to proceed under the service contract in light of litigation over deposit initiated in N.C. (J.A. 111)

14. 9-20-78 Hearing held regarding UNAC's petition for instructions at which the Guaranty Association asserted its full faith and credit claims as to

North Carolina statutes (Pet. App. 32A)

15. 11-22-78 Indiana court entered order holding that November 22, 1976, Final Order and Plan of Rehabilitation dismissed any claim by a N.C. policyholder or by the Guaranty Association against the deposit (Pet. App. 31A-41A)

16. 12-19-78 Guaranty Association appealed November 22, 1978 order to Indiana Court of Appeals raising full faith and credit and jurisdictional claims. (Pet. App. 25A)

6. 3-19-79 Hearing before N.C. Superior Court held on cross motions for summary judgment (Pet. App. 19A)

7. 4-11-78 N.C. Superior Court entered summary judgment order holding that Indiana rehabilitation court violated the full faith and credit clause and lacked jurisdiction to abrogate statutory rights of N.C. policyholders in deposit held in trust in N.C., and that deposit should be liquidated for the benefit of North Carolina policyholders (Pet. App. 19A-28A)

8. 4-20-79 UNAC appealed North Carolina Superior Court decision to North Carolina Court of Appeals (R. 52)

9. 9-2-80 N.C. Court of Appeals unanimously affirmed decision of N.C. Superior Court (Pet. App. 5A-16A)

10. 10-6-80 UNAC filed Notice of Appeal and Alternate Petition for Discretionary Review with the N.C. Supreme Court (J.A. 6)

11. 12-4-80 N.C. Supreme Court entered judgment dismissing UNAC's Appeal and denying UNAC's Petition for Discretionary Review (Pet. App. 1A)

12. 3-3-81 UNAC filed a Petition for Certiorari with the United States Supreme Court

17. 3-11-81 Indiana Court of Appeals heard oral argument on the Guaranty Association's appeal and stayed its consideration of the appeal pending action by the United States Supreme Court of this certiorari proceeding

13. 5-18-81 United States Supreme Court granted certiorari

SPECIAL DEPOSIT SCHEDULE

Showing all deposits or investments NOT held for the protection of ALL the policyholders of the Company

WHERE DEPOSITED	DESCRIPTION AND PURCHASE OF DEPOSIT (Indicating Literal Form of Registration of Securities)	PAR VALUE	STATEMENT VALUE	MARKET VALUE
	NONE			
	Totals			

SCHEDULE OF ALL OTHER DEPOSITS

Showing all deposits made with any Government, Province, State, District, County, Municipality, Corporation, firm or individual, except those shown in Schedule E and those shown in "Special Deposit Schedule" above

WHERE DEPOSITED	DESCRIPTION AND PURCHASE OF DEPOSIT (Indicating Literal Form of Registration of Securities)	PAR VALUE	STATEMENT VALUE	MARKET VALUE
• • • • • • • • • • • •	(preceding entries deleted)			
North Carolina Insurance Department	Inter-American Development Bank, 6.625%, due 11/1/93	100,000.00	80,182.53	80,000.00
• • • • • • • • • • • •	(subsequent entries deleted)			
	Totals	3,370,648.48	2,926,349.43	2,698,835.29

SPRING TERM 1981

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA, ON RELATION OF JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF NORTH CAROLINA,

Plaintiff

v.

RESERVE INSURANCE COMPANY,

Defendant

and

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION,

Third-Party Plaintiff

and

PHILIP R. O'CONNOR, AS DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS AND AS DOMICILIARY RECEIVER OF RESERVE INSURANCE COMPANY,

Third-Party Defendant

and

ROBERT P. BINKLEY, BENJAMIN T. SIMMONS, JR., WALLACE GRAHAM GETCHELL, AND ARNOLD ENGLAND, INDIVIDUALLY AND AS REPRESENTATIVE OF THE POLICYHOLDERS OF RESERVE INSURANCE COMPANY WHO ARE CITIZENS OR RESIDENTS OF NORTH CAROLINA OR WHO HOLD POLICIES ISSUED UPON PROPERTY IN NORTH CAROLINA, AND CAROLINA INSURANCE SERVICE, INC.

Third-Party Plaintiffs

Filed August 17, 1981
IN THE OFFICE OF CLERK SUPREME COURT
OF NORTH CAROLINA

No. 113-Wake

Appeal by the Commissioner of Insurance and third-party plaintiffs Carolina Insurance Service, Inc., and Binkley, et al., from decision of the Court of Appeals, 48

N.C. App. 643, 269 S.E.2d 757 (1980), reversing judgment of Hobgood, J., at the 6 July 1979 Session of WAKE Superior Court.

These proceedings were spawned by the insolvency of Reserve Insurance Company, an Illinois corporation doing business in North Carolina. On 7 May 1979 Reserve was enjoined by the Circuit Court of Cook County, Illinois from doing business except with the consent of the Illinois Director of Insurance. On 16 May 1979, the North Carolina Commissioner of Insurance ordered Reserve to cease writing new or renewal business in this State until its minimum maintained capital was restored. Reserve was adjudicated insolvent, and the Illinois director of Insurance was appointed "Domiciliary Receiver" on 29 May 1979, with powers to liquidate the business affairs of Reserve. The North Carolina Commissioner of Insurance filed this action against Reserve on 31 May 1979 pursuant to the Uniform Insurers Liquidation Act which is codified as part of Article 17A of Chapter 58 of the General Statutes.

The Commissioner alleged the insolvency of the defendant company and sought appointment as receiver in North Carolina. The Commissioner was appointed "Ancillary Receiver," and a restraining order was entered. This initial order of the North Carolina Court was followed by a preliminary injunction and order continuing the receivership on 8 June 1979. The relief sought was not resisted by Reserve and judgment by default was entered on 14 September 1979 making the ancillary receivership permanent. On the same date, the superior court entered a separate order requiring the Commissioner as "Ancillary Receiver" to liquidate Reserve's North Carolina assets, process claims and file his report with the court.

The only asset of Reserve in North Carolina is a special deposit of securities having a face value of $185,000. The securities were deposited with the Treasurer of North Carolina pursuant to Article 20 of Chapter 58 of the General Statutes as a condition of doing business in North Carolina. Reserve was required to deposit the securities and give the Commissioner a power of attorney to use the securities to pay liabilities of North Carolina policyholders resulting from any default of Reserve.

The North Carolina Insurance Guaranty Association also began operations to pay liabilities and claims for North Carolina policyholders resulting from the insolvency of Reserve. The Guaranty Association was created by the Insurance Guaranty Association Act, which is Article 17B of Chapter 58 of the General Statutes. The Association is composed of all casualty insurance companies which transact business in North Carolina. When a member company is adjudged insolvent by a court of competent jurisdiction, the Association bears the responsibility for paying claims against the company which are greater than $100 but not to exceed $300,000 per claim. The payments are financed through membership assessments.

On 8 June 1979, the Guaranty Association filed a motion, which was allowed, to intervene in the Commissioner's liquidation suit. On 15 June 1979, the Guaranty Association filed an "answer, counterclaims, crossclaims, and third-party complaint," the basic purpose of which was to assert the Association's rights to the special securities deposit both as lienor and under a piece of legislation enacted by the General Assembly on 23 May 1979 as part of the Insurance Guaranty Association Act entitled the "Quick Access Statute" and codified as G.S. 58-155.60. A motion for partial summary judgment was

filed with this pleading requesting the court to enter judgment declaring the Guaranty Association's right to have the special deposit of Reserve delivered to the Association to pay covered claims as provided in G.S. 58-155.60. The Commissioner as ancillary receiver in answer denied the essential allegations of the Guaranty Association.

On 2 July 1979, Carolina Insurance Service, Inc.,[1] the general agent for Reserve in North Carolina and several individual policyholders on their own behalf and on behalf of other individual policyholders with Reserve, filed motions to intervene in the liquidation suit which were allowed. These third-party plaintiffs sought a declaratory judgment (1) that the policyholders of Reserve had a lien on the special deposit superior to that of the Guaranty Association and (2) that the deposit not be delivered to the Guaranty Association. On the same day, the Commissioner as Ancillary Receiver moved to dismiss the claim of the Guaranty Association to the deposit, alleging G.S. 58-155.60 was void and unconstitutional.

The superior court heard arguments of the parties concerning disposition of the special deposits. The Guaranty Association contended G.S. 58-155.60 gave it a right to the deposit to cover *claims and expenses* arising out of the insolvency of Reserve. The Commissioner, Carolina Insurance Service, Inc. and the individual policyholders argued that allowing the Guaranty Association's claim to the special deposit pursuant to G.S. 58-155.60 would interfere with a vested property right of the policyholders in that it would unlawfully and retroactively divest them of

[1]Carolina Insurance Service, Inc., alleged it held $81,326.25 in funds, representing premiums for policies written prior to the liquidation proceeding. Carolina sought to create a trust for its policyholders in these funds and determine whether they should be paid to the domiciliary receiver or the ancillary receiver. These questions raised by Carolina are not at issue in this appeal.

their lien rights in the special deposits as specified in G.S. 58-185.

On 6 July 1979, the superior court denied the Guaranty Association's motion for summary judgment. In support of this order, the superior court listed these material facts which were not excepted to by any party on appeal: (1) Reserve was adjudicated insolvent on 29 May 1979; (2) there were more than 1700 policyholders in North Carolina who held contracts of insurance with Reserve written between 30 May 1978 and 7 May 1979; (3) all these policyholders will be entitled to return of the unearned premiums by virtue of the insolvency; (4) the total amount of unearned premiums equals approximately $184,528.49 of which amount approximately $89,096.78 represents claims to be paid by the Guaranty Association and $95,431.71 represents total unearned premiums up to a maximum of $100 on each policy which will not be paid by the Guaranty Association; and (5) the Quick Access statute, G.S. 58-155.60 was enacted on 23 May 1979 with an effective date of 23 May 1979. The court then concluded as a matter of law that G.S. 58-155.60 could be applied prospectively only and therefore not to the insurer insolvency in question in this case and that the policyholder liens against the special deposits pursuant to G.S. 58-185 were superior to any rights of the Guaranty Association. The Guaranty Association appealed to the Court of Appeals.

The Court of Appeals reversed the superior court and remanded the case, ordering that the special deposits be delivered to the Guaranty Association. That court reasoned G.S. 58-155.60 could be applied retroactively. The Court of Appeals stated:

> We hold that the superior court committed error when it did not order the deposits of Reserve

> delivered to the Guaranty Association. The claimants under G.S. 58-185 will retain their lien rights and may proceed against the Guaranty Association to the extend of the deposit for any claims they may have had under G.S. 58-185 which are not satisfied by the Guaranty Association.

48 N.C. App. at 648, 269 S.E.2d at 760.

The Commissioner as Ancillary Receiver, Carolina Insurance Service, Inc., and the individual policyholders appealed to this Court which granted their petitions for discretionary review pursuant to G.S. 7A-31.

> RUFUS L. EDMISTEN, Attorney General, by RICHARD L. GRIFFIN, Assistant Attorney General, for State of North Carolina ex rel. Commissioner of Insurance, plaintiff appellant .
>
> CRAIGE, BRAWLEY, LIIPFERT & ROSS, by COWLES LIIPFERT, C. THOMAS ROSS and TERRIE A. DAVIS, Attorneys for Carolina Insurance Service, Inc., Robert P. Binkley, Benjamin T. Simmons, Jr., Wallace Graham Getchell and Arnold England and the North Carolina policyholders of Reserve Insurance Company, third-party plaintiff appellants.
>
> ALLEN, STEED and ALLEN, P.A., by ARCH T. ALLEN, III, and ANN HOGUE PAPPAS, Attorneys for North Carolina Insurance Guaranty Association, third-party plaintiff appellee.

HUSKINS, Justice:

This case involves construction of G.S. 58-155.60, the "Quick Access" statute, and whether it applies retroactively to divest the lien of North Carolina policyholders of

Reserve, whose policies were issued before the statute was enacted into law, in certain securities deposited by Reserve to cover claims in the event of its default. We conclude the statute can be applied constitutionally to the present case.

Before we explain the effect of G.S. 58-155.60 in the present case, some background information is relevant to show how our regulated insurance industry operates when a foreign insuring company defaults on its obligations in this State.

Three separate articles of Chapter 58 of the General Statutes apply to the present case: Article 20—Deposits by Insurance Companies, originally enacted in 1909; Article 17A— Mergers, Rehabilitation and Liquidation of Insurance Companies, which contains the Uniform Insurers Liquidation Act, originally enacted in 1947; and Article 17B—the Insurance Guaranty Association Act, originally enacted in 1971. The older articles were neither repealed nor superseded by the later articles. All the provisions have one basic purpose: to better protect North Carolina claimants and policyholders. The interrelationship of the provisions is readily apparent on the facts of this case: The security deposit of Reserve was made and held pursuant to Article 20; the ancillary receivership of the Commissioner was established pursuant to Article 17A and the Guaranty Association is paying claims and liabilities pursuant to Article 17B.

Beginning in 1909, the State required certain insurance companies to make deposits with the Commissioner of Insurance. G.S. 58-182. Foreign casualty companies such as Reserve have been required to make deposits since 1945. G.S. 58-182.1. Such deposits are a prerequisite for a license to do business in this State. G.S. 58-188. The deposits are in an amount specified by statute, G.S.

58-182, -182.1, -182.2, and are not made in currency but in bonds of the United States, North Carolina or cities and counties of this State. G.S. 58-182.3. The deposits are to be delivered by the Commissioner to the Treasurer of the State for safekeeping to "be held exclusively and solely for the protection of contract holders." G.S. 58-182.6; *see also* G.S. 58-188.1. The depositing insurance company is entitled to the interest from the securities "until the company fails to pay any liability arising upon any" covered policy, "and thereafter the interest, so long as the liability exists shall be payable to the Commissioner of Insurance, to be applied, if necessary, to the payment of such liability." G.S. 58-183.

The deposit statutes also require a power of attorney to the Commissioner "authorizing the sale or transfer of said securities or any part thereof for the purpose of paying any of the liabilities provided for in this Article." G.S. 58-182.5. "If the company fails to pay any of its liabilities on its contracts . . ., the Commissioner of Insurance shall, upon application of the party to whom the debt or money is due, . . . proceed to sell at public auction such an amount of securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses . . . ." G.S. 58-184. G.S. 58-185 creates a lien in the deposit for policyholders and a procedure[2] for disposition of the funds on deposit in the event of insolvency of an insurer as follows:

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[2]This procedure for disposition was altered by the adoption of the Uniform Insurers Liquidation Act in 1947 in that the ancillary receiver of a foreign insurer is to liquidate "special deposit claims." G.S. 58-155.12(b).

> Upon the securities deposited with the Commissioner of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance.

See also G.S. 58-188.1. Deposits pursuant to Article 20 constitute a *trust* for the benefit of North Carolina policyholders and are not *assets* of the insolvent insurance company. Continental Bank & Trust Co. v. Gold, 140 F.Supp. 252 (E.D.N.C. 1956); 2 Couch on Insurance §§ 22:94, 22:96, 22:111 (2d Ed. 1959); 19 Appleman, Insurance Law and Practice § 11094 (1979 Supp.); *see also* Guaranty Association v. Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688, *cert. den.*, 301 N.C. 527, 273 S.E.2d 453 (1980), *cert. granted,* _____U.S._____, 68 L.Ed.2d 838, _____S.Ct._____(1981). Such deposits supplement

the general corporate law which does little to protect claimants and policyholders of insolvent insurers. Reserve made deposits pursuant to Article 20 having a face value of $185,000. The policyholders are entitled to the lien provided for in G.S. 58-185.

The deposits required by Article 20 and the general corporate law did not go far enough to protect North Carolina policyholders and claimants. To further this desired protection, the legislature adopted in 1947 as part of Article 17A the Uniform Insurers Liquidation Act. *See* 25 N.C. L. Rev. 429 (1947). It provides the mechanism for liquidation of Reserve. Illinois has also adopted the Uniform Insurers Liquidation Act. Ill. Rev. Stat. Ch. 73 §§ 833.1 to 833.13. A domiciliary receiver was appointed in Illinois. Under the Act, the Commissioner is appointed ancillary receiver in this State. G.S. 58-155.9(b); G.S. 58-155.12(a).

Both the North Carolina and Illinois versions of the Uniform Act make specific reference to "special deposits" and recognize the right of an ancillary receiver to liquidate claims against these deposits. G.S. 58-155.10(11), -155.12(b) and -155.15(c); Ill. Rev. Stat. Ch. 73§§ 833.1(8), 833.6 and 833.8. A "special deposit claim" is defined as "any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes or persons. . . ." G.S. 58-155.10(11). The funds in question in this case are such deposits. Such deposits are expressly excluded from general assets. G.S. 58-155.10(5). The ancillary receiver "shall, as soon as practicable, liquidate from their respective securities those special deposit claims . . . which are proved and allowed in this State. . . ." G.S. 58-155.12(b). "The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority

against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits." G.S. 58-155.15(c). Thus, whatever Article 20, *i.e.*, G.S. 58-185, says about priorities, controls. Article 17A merely provides supplemental procedures to expedite the liquidation process and specifies the date on which all rights are fixed:

> The rights and liabilities of the insurer and of its creditors, policyholders . . . and all other persons interested in its estate shall, unless otherwise directed by the court, be *fixed as of the date on which the order directing the liquidation of the insurer is filed* in the office of the clerk of the court which made the order, subject to the provisions of G.S. 58-155.29 with respect to the rights of claimants holding contingent claims.

G.S. 58-155.25 (emphasis added).

In 1971, the legislature effected additional protection for North Carolina policyholders by enacting Article 17B, creating an organization, the Insurance Guaranty Association, which would promptly ascertain claims against an insolvent insurer and pay each covered claim of $100 to $300,000 which arises within thirty days of a determination of insolvency. G.S. 58-155.48(a)(1). The purpose of The Association "is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. . . ." G.S. 58-155.42. At least forty-five states have enacted versions of a Model Post-Assessment Guaranty Association Act. *See* Hank, Post-Assessment Guaranty Funds: Are They the Ultimate Solution to the Insolvency Problem? 1976 Insurance Law Journal 482. It serves as an adjunct to normal liquidation proceedings.

See Cooper Claims Service v. Arizona Insurance Guaranty Ass'n., 22 Ariz. App. 16, 158, 524 P.2d 1329, 1331 (1974). The Guaranty Association is a non-profit unincorporated legal entity which covers all property and casualty insurance business transacted in North Carolina. G.S. 58-155. All insurance companies licensed to transact business in North Carolina and not exempted by G.S. 58-155.43 must become members of the Association. G.S. 58-155.46. The Association acts as insurer. G.S. 58-155.48(a)(2).

To pay covered claims, the Guaranty Association assesses its members based upon the percentage of business transacted in North Carolina. G.S. 58-155.48(a)(3). The Association has the power to borrow funds to pay covered claims. G.S. 58-155.48(b)(2). Once the Association pays a claim, any person receiving payment "shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association." G.S. 58-155.51(a). The Act also provides that "[t]he expenses of the Association . . . shall be accorded the same priority as the liquidator's expenses." G.S. 58-155.51(b).

This is a basic outline of the law as it existed in May 1979 when Reserve was adjudicated insolvent and G.S. 58-155.60 was enacted by the legislature. The parties refer to this statute as the "Quick Access" statute, and it is captioned "use of deposits made by insolvent insurer." It reads in pertinent part as follows:

> Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the

> Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not required by statute, by an insolvent insurer to the extent those deposits are needed by the Association first to pay the covered claims in excess of one hundred dollars ($100.00) as required by this Article and then to the extent those deposits are needed to pay all expenses of the Association relating to the insurer.
>
> The Association shall account to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder, and shall repay to the Commissioner a portion of the deposits received which shall be equal to an amount computed by adding the lesser of the amount of the covered claim or one hundred dollars ($100.00) for each covered claim. Said repayment shall in no way prejudice the rights of the Association with regard to the portion of the deposit repaid to the Commissioner. After all of the deposits of the insolvent insurer have been expended by the Association for the purposes set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article.

The statute was ratified a week before Reserve was adjudged insolvent. The legislature specified that the Act would become effective upon ratification. 1979 N.C. Sess. Laws c. 628, § 2. The Guaranty Association sought access to the special deposits pursuant to this statute and was opposed by both the Commissioner and policyholders of Reserve.

No one contends the Quick Access statute fails to pass constitutional muster except in its application to the facts of this case. The policyholders contend that application of the statute's provisions to the Reserve insolvency will result in a retroactive divestment of the liens of North Carolina policyholders which were effective before the statute was ratified. The Commissioner contends that although the Guaranty Association has the right to use the deposits pursuant to the Quick Access statute, the Association is required to repay him the full amount of the deposit.

The Guaranty Association contends the Quick Access statute is a procedural and remedial statute intended to expedite payment of claims against the insolvent insurer by using the special deposit to pay those claims directly rather than later reimbursing the Guaranty Association for the claims. Thus, it does not divest policyholders of any rights in the deposits but merely provides an expedited procedure for obtaining those deposits. The Association also contends the Commissioner is not entitled to a full repayment of deposits.

The Quick Access statute applies "[n]otwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders . . . ." The statute thus controls should there be any conflict in preexisting provisions. The statute goes on to provide that "the Commissioner shall deliver to the Association" and "the Association is hereby authorized to expend . . ." the deposit. The statute expressly mandates the delivery to and use of the deposit by the Guaranty Association. The statute applies "to any deposit or deposits previously or hereinafter made . . . ." This coupled with the legislative mandate that the statute apply on ratification is a clear ex-

pression that the legislature intended the statute to apply to the present case. The policyholders make four arguments that this retroactive application of the statute creates new classes and priorities of claims against deposits.

The policyholders argue that as the Association pays claims and expenses from the deposit, the "lien would dwindle and possibly disappear." This is not so. The lien of the policyholders remains as long as needed. The Association has subrogation rights to the liens. G.S. 58-155.51(a). Thus, as the Association pays claims, it continuously acquires the liens. Once the Guaranty Association has paid claims between $100 and $300,000, and has returned deposit funds covering claims less than $100, all liens in the deposit pursuant to G.S. 58-185 are extinguished or have been acquired by the Association. The policyholders still have a lien until satisfied by the Association or the Commissioner. The lien rights of policyholders transfer with the deposit proceeds when they pass from the Commissioner to the Association. *See* Surety Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The policyholders next argue that the statute eliminates interest on the deposit that would otherwise be earned and applied to payment of liabilities pursuant to G.S. 58-183. The only policyholders who can complain on this point are those with claims under $100. All other claims are promptly paid by the Association. The loss in interest is de minimis, particularly in light of the Association's quicker payment of claims in amounts greater than the deposits.

The policyholders contend that G.S. 58-155.48(a)(1) creates an entirely separate class of claims not covered by G.S. 58-185. The Association is required by G.S. 58-155.48(a)(1) to pay claims on policies terminated by the

insolvency of an insurer arising within a thirty-day period *after* the adjudication of insolvency and before an insured has replaced the policy. On the other hand, G.S. 58-155.25 fixes the rights and liabilities of the parties as of the day of insolvency unless otherwise specified by the court. Along the same lines, the policyholders, contend the "$100-over $300,000-under" exclusion conflicts with the pro rata distribution requirement of G.S. 58-185, thus extending coverage at the expense of their liens. This is not so. Neither the thirty-day extension nor the amount of the exclusion expands the liens. The liens of policyholders remain the same and remain limited pro rata "for the amounts due them." G.S. 58-185.

Finally, the policyholders argue that the Association can consume the deposit funds for Association expenses and thereby dilute their fixed rights. Such is not the case. The statute does authorize the use of deposits after claims of over $100 are paid "to the extent those deposits are needed to pay all expenses of the Association relating to the insurer." G.S. 58-155.60. However, this is only a temporary use. All deposits must be applied to claims and liabilities except for a minor amount related to the Commissioner's expenses in selling the bonds. G.S. 58-184. The only rights the Association has against the deposits are the subrogation rights under G.S. 58-155.51(a). The Association does not have a right to debit deposits for its expenses unless *all* deposit liens are satisfied and there is a surplus of deposit proceeds.

The expenses of the Association are accorded "the same priority as the liquidator's expenses." G.S. 58-155.51(b). However, that priority extends only to general assets. Special deposits are not general assets. Thus, the mechanism of this statute does nothing to dilute any rights of policyholders.

The Commissioner contends the Association is required to repay all of the deposit to the Commissioner. His authority for this contention is the statute's provisions that "the Association shall *account* to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder." The Commissioner would have us construe the word "account" to mean "pay over" to the receiver the entire special deposit of $185,000. The Commissioner also cites G.S. 58-155.51(c), which requires the Association to file statements with the liquidator or receiver to "preserve the rights of the Association against the assets of the insolvent insurer," as authority for his position that the Association has only temporary use of the deposits. We reject the Commissioner's argument insofar as it would require absurd repayments of funds the Association has paid to policyholders. The Association must account to the Commissioner on how it uses and applies *all* the funds. When all is said and done, it must establish that every cent of the money was applied to claims or was returned to the Commissioner. The Association can use the funds at the outset to cover its operating expenses. However, the Association has no permanent right in these funds for operating expenses unless all claims are paid and deposit funds remain. Thus, the only repayment to the Commissioner is for the claims under $100 which the Association is not authorized to pay. After all claims are paid, deposit funds can be used by the Association and not refunded to the Commissioner since he would then have no claimants to reimburse.

In summary, the Court of Appeals was correct in its interpretation of G.S. 58-155.60 as not affecting the lien rights of policyholders under G.S. 55-185. The Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent. However, *all*

deposit funds must be paid to claimants pro rata as provided by G.S. 55-185. If all claimants are satisfied either directly by the Association or by the Commissioner (if the claim is under $100) and deposit funds remain, then and only then are such funds to be permanently credited to the Association for its expenses. These deposit funds which are provided to the Association as "seed money" must bear fruit for the policyholders and claimants for whom they were placed in trust.

For the reasons stated, the decision of the Court of Appeals is

Modified and Affirmed

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No. 80-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

Petitioner,

VS.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

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I

RESPONDENTS IGNORE THE PRACTICAL EFFECTS OF THEIR POSITION

Respondents ignore or shrug off the practical effects of the North Carolina doctrines they seek to uphold. But it is

those very considerations that mandate reversal. First, it must be understood that if the NCGA can succeed here, every policyholder in every state in which there is a deposit can accept the benefits of a proposed rehabilitation, including insurance coverage over an extended period, sit back and see how it goes, then bring suit at any time up to the limitations period to foreclose on the desposit. Respondents admit that they would force a rehabilitator in the state of domicile—which is after all, a state agency—to sue in every state in which there is a deposit even if there is no dispute over the proposed plan of rehabilitation (Resp. Br. 27). For the reasons set forth in UNAC's principal brief, the reality of such a mess is that rehabilitation may be rendered impractical.

Respondents also seek to frame their contentions in terms of the North Carolina policyholders' interests. But the NCGA makes the policholders whole. No policyholder is helped or hindered by any disposition of this case. Moreover, the state officers in North Carolina and every other state were notified of the proposed plan before it became effective precisely because the various insurance departments are better equipped than the individual policyholders to evaluate the proposal from the policyholders' standpoint. The complexity of insurance and the difficulty of such an analysis is why each state has an insurance commissioner. But the time for the North Carolina commissioner to perform that job expired in 1976 with the entry of the Final Judgment adopting the Plan.

It is also important to note that respondents' arguments prove too much. If respondents were correct, several mini-rehabilitations around the nation would have been required even if no policholder had sued UNAC in any state. And this would be true even if no one objected to the domiciliary state's jurisdiction and no one wished to sequester a deposit. In short, jurisdiction of the domiciliary state limited to an adjustment of the policyholders' claims is necessary as a practical matter.

Moreover, North Carolina seeks to obtain more by its belated attack than its policyholders would have received if they had made a timely move to obtain the deposit. The policyholders have received and are receiving insurance coverage. And the benefits of ongoing insurance may—and here did—outweigh the benefits of grabbing the deposit.[1] The NCGA by its belated attack would *add* the deposit to these benefits, not *substitute* it for them. The latter would have been the result of a pre-rehabilitation claim. The former is wholly unfair to UNAC and its policyholders in other states.

Finally, the NCGA in Part IV of its brief offers no semblance of an explanation why it had no "notice" of the subject matter of the 1978 Indiana proceeding or why as an intervening plaintiff it was not subject to the jurisdiction of the Indiana Court.

II

RESPONSE TO NEWLY RAISED POINTS

Respondents have advanced a number of contentions for the first time in this Court. None has any merit. Taking them in descending order of frequency of appearance in respondents' brief:

A. The Claim That The Indiana Court Was Misled Is Procedurally And Substantively Meritless

This contention—raised for the first time in this Court—is preposterous. First, if there were any basis to such a claim, it was properly raised in the 1978 proceeding in Indiana. It was not presented in Indiana. Nor was it raised in the North Carolina courts. Second, the Indiana Court's

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[1] Indeed, in Canada where full faith and credit does not make the Indiana Final Judgment binding, deposits were nonetheless not enforced and the Plan was adopted by a proceeding in the Canadian courts (R. 30, Ex. Bd. 296).

1978 judgment, findings and conclusions (Pet. App. 37A-38A) make clear it understood the North Carolina deposit could have been sequestered if a pre-rehabilitation claim had been timely asserted by a North Carolina policyholder or the NCGA as assignee of a North Carolina policyholder. Third, petitioner (UNAC) was under the control of the Indiana Department of Insurance at the time it was in rehabilitation. The Plan that ultimately became the final rehabilitation judgment was authored by the State of Indiana acting through its insurance commissioner. Fourth, the Plan was sent to the North Carolina insurance commissioner who, from the first days of the rehabilitation, had called the North Carolina deposit to the NCGA's attention (R. 23, Ex. Bd. 26). To contend that the North Carolina officials and the NCGA—an association of North Carolina insurance companies—did not know the nature of the deposit is not only without basis in the record, it is inherently unbelievable. Fifth, UNAC is aware of no statutory or other procedure by which a deposit could be posted in a state outside the insurer's domicile except to secure claims of insureds in the state receiving the deposit. In short, the "misled court" argument is hokum.

B. All Policholders, State Insurance Commissioners And Guaranty Associations Were On Notice Of The Plan

Similarly, there is no substance to the claim that the NCGA had no notice of the proposed effect of the Plan. Respondents claim (Resp. Br. 17) that the NCGA first learned of UNAC's position in a 1977 exchange of letters. If this is an assertion of fact—*i.e.*, a report of the subjective state of awareness of NCGA's management—it bears no support in the record. It is irrelevant in any event. It makes no difference whether the NCGA actually read the Plan. The point is it received a copy of both the proposed plan and the final Plan. And if the claim of lack of notice is a legal conclusion, it is flat wrong. The Plan in numerous provisions made clear that all claims of any nature against

UNAC or its property would be compromised (J.A. 59, 62, 75, 80). In that respect the final provisions are virtually identical to the provisions of the proposed plan (R. 30, Ex. Bd. 118, 120, 129, 132). The Plan plainly put everyone—including the North Carolina commissioner and the NCGA—on notice that it would terminate all claims against UNAC.

If this were not enough, the "notice" is not a prospectus and is not required by any federal constitutional doctrine to be one. The quote from *Mullane v. Central Hanover Bank* appearing at page 43 of respondents' brief relates to the *manner* of notice (mail, publication, etc.) and whether or not the person being noticed learns anything at all. It has nothing to do with *content* of the notice. More important, any policyholder who read the 1976 notice (J.A. 21-25) could glean the essentials of the proposed plan. Indeed, the entire text of the proposed plan was enclosed (R. 30, Ex. Bd. 175, 117-32). The notice was intended to be intelligible and to convey the essentials of a complex situation. It is more than adequate for that purpose. Anyone who wishes more detailed information is free to ask for it. But all that "notice" requires is that the time and place and subject matter of the hearing be given. To underscore this, the proposed plan could be changed as a result of testimony at the final hearing, and anyone who failed to show up has no complaint. In sum, if a defect in the content of the notice is alleged, it surely did not amount to a lack of due process. As a result, the 1976 Final Judgment and Plan is entitled to full faith and credit. In any event, the 1978 Order of the Indiana Court is entitled to full faith and credit.

C. The Indiana Final Judgment Does Not "Void" Or "Render Nugatory" The North Carolina Law

The effect of the Indiana Court's 1976 Final Judgment was (a) to compromise all pre-rehabilitation claims of all policyholders, and (b) to leave the North Carolina deposit in North Carolina as security for any future breach of

UNAC's post-rehabilitation obligations. As such, the North Carolina statute is fully honored. If there had been such a pre-rehabilitation suit in North Carolina (or a claim in the Indiana rehabilitation proceeding) to sequester the desposit for North Carolina policyholders, it might well have prevailed. Neither occurred. And if there is a future breach by UNAC, the deposit is there for the North Carolina policyholders. All the rehabilitation did was exchange ongoing insurance for a settlement of all past claims.

Indeed, the very passage quoted by respondents (Resp. Br. 30) to support the idea that deposits in other states are for the benefit of policyholders in the state of deposit recognizes that their claims may be "paid or extinguished." 2 *Couch on Insurance* § 22:96 (2d ed. 1959). Here the North Carolina claims were extinguished. The question is not whether the North Carolina policyholders could have proceeded against the deposit. It is whether, since they do not do so, the state of domicile could wrap up the rehabilitation. As to that, the limited jurisdiction conferred by Indiana law on the Indiana Rehabilitation Court is sufficient.

Respondents sometimes suggest that the Indiana Court adjudicated that the deposit "was a general asset" of UNAC. That is only somewhat accurate. The Indiana Court's Final Judgment had the effect of compromising the policyholders' claims. In all calculations of liquidation ratios, etc., all assets of UNAC everywhere were treated the same. In that sense the Plan treated the deposit as a "general asset." But the Plan does not purport to limit the North Carolina policyholders' rights in the event of a future breach. In that sense the deposit is still "in trust." And the Plan did not hold that a North Carolina policyholder could not have moved against the deposit up to the 1976 Final Judgment. All the Plan held was that claims against the asset or otherwise based on UNAC's pre-rehabilitation

breaches are compromised and settled, effective as of the 1976 Final Judgment. Since there is no present default by UNAC, there is no basis for liquidating the deposit.

D. The Indispensible Party Argument

Respondents contend that the officials of the State of North Carolina are essentially "trustees" and were therefore indispensible parties to the Indiana proceeding. This does not do the job. First, whether the rights of the policyholders as "beneficiaries" can be adjudicated in the absence of the state officer as "trustee" is a matter of Indiana state procedural law. If Indiana holds—as it does—that its courts can bind the policyholders and the NCGA by proceeding as the Rehabilitation Court did, the only issue left is whether Indiana has the jurisdiction to do so. Full faith and credit leaves nothing to be decided in North Carolina. The only Indiana authority is the trial court decision now on appeal to the Indiana Court of Appeals. That decision implicitly rejects the claim that more needed to be done with respect to the North Carolina officers than was done. It does not explicitly meet the point because the claim was not raised in Indiana. If it had merit (which it does not) it could have been presented to the Indiana courts.

Second, to call the officials "trustees" is only the beginning of analysis. Unlike conventional trustees, they have no discretion to do anything except liquidate the deposit and apply it to claims "upon application of the party to whom the debt or money is due." N.C. Gen. Stat. § 58-184. A more accurate description is escrow agent, not "trustee." But however the officers are denominated, the power of an Indiana court to adjudicate the claims of the policyholders against UNAC in their absence is purely a question of Indiana law, assuming, as is the case, the Indiana Court has jurisdicion *in rem* or personal jurisdiction over the policyholders or their claims.

Third, the State of North Carolina did get the same notice of the proposed plan as each policyholder received. (J.A. 21-

25; R. 30, Ex. Bd. 175, 117-32). To the extent the State of North Carolina was a necessary party, it had an opportunity to have its day in court.

E. The Commerce Clause Argument Was Properly Raised Below

UNAC asserted full faith and credit as a defense in its initial answer (J.A. 107) to the NCGA's complaint and has pursued that point at all stages of this suit. Respondents suggest, however, that commerce clause objections to what now appears to be North Carolina's indispensible party argument were not timely raised. UNAC first pointed to the commerce clause in its Notice of Appeal to the Supreme Court of North Carolina because the North Carolina Court of Appeals' decision for the first time may have indicated that these officials, as a matter of North Carolina state law, may have some interest in the deposit that precludes adjudicating the policyholders' rights in the absence of the officers. To the extent this is an element of the basis of North Carolina's sustaining a post-rehabilitation attack based on pre-rehabilitation breaches, no such contention was advanced below. The North Carolina statute does not suggest that the officials have any such interest. Nor do the numerous cases dealing with other nationwide rehabilitations suggest that all 50 insurance departments are necessary parties. Under these circumstances, the issue was timely raised for purposes of this Court's jurisdiction because no one had contended that the officials had any interest until the North Carolina Court of Appeals rendered its opaque opinion. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930). UNAC is uncertain as to the theoretical underpinnings of the North Carolina Court of Appeals' decision. UNAC submits that the full faith and

credit clause is all this Court needs to consider to hold for UNAC. But to the extent the North Carolina decision does turn on an indispensible party doctrine, UNAC's commerce clause objections as presented in the petition for certiorari are preserved.

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